



# Commentary Part 1

*Chapters 1-9*

**The Nordic Marine Insurance Plan of 2013 - *Version 2019***

Based on the Norwegian Marine Insurance Plan of 1996, Version 2010

# CONTENTS

## Part one RULES COMMON TO ALL TYPES OF INSURANCE ..... 7

### Chapter 1 Introductory provisions..... 8

Clause 1-1.	Definitions .....	8
Clause 1-2.	Policy .....	9
Clause 1-3.	Contracts entered into through a broker .....	10
Clause 1-4A.	Jurisdiction and choice of law .....	12
Clause 1-4B.	Arbitration Clause.....	14
Clause 1-5.	Insurance period.....	15

### Chapter 2 General rules relating to the scope of the insurance ..... 18

#### Section 1 Insurable interest and insurable value..... 18

Clause 2-1.	Insurance unrelated to any interest .....	19
Clause 2-2.	Insurable value .....	20
Clause 2-3.	Agreed insurable value .....	21
Clause 2-4.	Under-insurance.....	22
Clause 2-5.	Over-insurance.....	24
Clause 2-6.	Liability of the insurer when the interest is also insured with another insurer.....	24
Clause 2-7.	Recourse between the insurers where the interest is insured with two or more insurers.....	26

#### Section 2 Perils insured against, causation and loss .....28

Clause 2-8.	Perils covered by an insurance against marine perils .....	28
Clause 2-9.	Perils covered by an insurance against war perils .....	41
Clause 2-10.	Perils insured against when no agreement has been made as to what perils are covered by the insurance.....	54
Clause 2-11.	Causation. Incidence of loss .....	54
Clause 2-12.	Main rule relating to the burden of proof .....	65
Clause 2-13.	Combination of perils .....	69
Clause 2-14.	Combination of marine and war perils .....	74
Clause 2-15.	Losses deemed to be caused entirely by war perils .....	76
Clause 2-16.	Loss attributable either to marine or war perils .....	78
Clause 2-17.	Sanction limitation and exclusion.....	79

<b>Chapter 3 Duties of the person effecting the insurance and of the assured .....</b>	<b>80</b>
<b>Section 1 Duty of disclosure of the person effecting the insurance.....</b>	<b>81</b>
Clause 3-1. Scope of the duty of disclosure .....	81
Clause 3-2. Fraudulent misrepresentation.....	83
Clause 3-3. Other failure to fulfil the duty of disclosure .....	84
Clause 3-4. Innocent breach of the duty of disclosure .....	86
Clause 3-5. Cases where the insurer may not invoke breach of the duty of disclosure.....	87
Clause 3-6. Duty of the insurer to give notice .....	88
Clause 3-7. Right of the insurer to obtain particulars from the <i>vessel's</i> classification society, etc. ....	88
<b>Section 2 Alteration of the risk .....</b>	<b>89</b>
Clause 3-8. Alteration of the risk .....	90
Clause 3-9. Alteration of the risk caused or agreed to by the assured .....	93
Clause 3-10. Right of the insurer to cancel the insurance.....	93
Clause 3-11. Duty of the assured to give notice .....	93
Clause 3-12. Cases where the insurer may not invoke alteration of the risk .....	93
Clause 3-13. Duty of the insurer to give notice .....	95
Clause 3-14. Loss of the main class .....	95
Clause 3-15. Trading areas.....	96
Clause 3-16. Illegal undertakings.....	100
Clause 3-17. Suspension of insurance in the event of requisition .....	101
Clause 3-18. Notification of requisition.....	102
Clause 3-19. Suspension of insurance while the <i>vessel</i> is temporarily seized .....	103
Clause 3-20. Removal of the <i>vessel</i> to a repair yard .....	103
Clause 3-21. Change of ownership .....	105
<b>Section 3 Safety regulations .....</b>	<b>106</b>
Clause 3-22. Safety regulations .....	108
Clause 3-23. Right of the insurer to demand a survey of the <i>vessel</i> .....	113
Clause 3-24. (open) .....	114
Clause 3-25. Breach of safety regulations .....	114
Clause 3-26. <i>Vessels</i> laid up .....	118
Clause 3-27. Right of the insurer to cancel the insurance.....	119
Clause 3-28. Terms of contract .....	120
<b>Section 4 Measures to avert or minimise loss, etc. ....</b>	<b>120</b>
Clause 3-29. Duty of the assured to notify the insurer of a casualty .....	120

Clause 3-30.	Duty of the assured to avert and minimise loss .....	121
Clause 3-31.	Consequences of the insured neglecting his duties.....	122
<b>Section 5 Casualties caused intentionally or negligently by the assured .....</b>		<b>123</b>
Clause 3-32.	Intent .....	123
Clause 3-33.	Gross negligence.....	124
Clause 3-34.	Right of the insurer to cancel the insurance.....	125
Clause 3-35.	Circumstances precluding the application of Clauses 3-32 to 3-34.....	126
<b>Section 6 Identification .....</b>		<b>127</b>
Clause 3-36.	Identification of the assured with his servants.....	130
Clause 3-37.	Identification of two or more assureds with each other and of the assured with a co-owner .....	134
Clause 3-38.	Identification of the assured with the person effecting the insurance.....	136
<b>Chapter 4 Liability of the insurer.....</b>		<b>137</b>
<b>Section 1 General rules relating to the liability of the insurer .....</b>		<b>138</b>
Clause 4-1.	Total loss.....	138
Clause 4-2.	General financial loss and loss resulting from delay .....	139
Clause 4-3.	Costs of providing security, etc. ....	139
Clause 4-4.	Costs of litigation.....	140
Clause 4-5.	Costs in connection with a claim .....	141
Clause 4-6.	Costs in connection with measures relating to several interests .....	143
<b>Section 2 Costs of measures to avert or minimise the loss, including salvage awards and general average.....</b>		<b>144</b>
Clause 4-7.	Compensation of the costs of measures to avert or minimise loss .....	146
Clause 4-8.	General average .....	150
Clause 4-9.	General average apportionment where the interests belong to the same person.....	155
Clause 4-10.	Damage to and loss of the object insured .....	155
Clause 4-11.	Assumed general average .....	156
Clause 4-12.	Costs of particular measures taken to avert or minimise loss.....	156
<b>Section 3 Liability of the assured to third parties .....</b>		<b>158</b>
Clause 4-13.	Main rule.....	158
Clause 4-14.	Cross liabilities .....	158

Clause 4-15.	Unusual or prohibited terms of contract .....	162
Clause 4-16.	Objects belonging to the assured .....	163
Clause 4-17.	Determination of the liability of the assured .....	164

#### **Section 4 The sum insured as the limit of the liability of the insurer..... 164**

Clause 4-18.	Main rule.....	164
Clause 4-19.	Liability in excess of the sum insured .....	168
Clause 4-20.	Limit of liability where loss is caused by a combination of perils .....	168
Clause 4-21.	Right of the insurer to avoid further liability by payment of the sum insured .....	169

### **Chapter 5 Settlement of claims ..... 170**

#### **Section 1 Claims adjustment, interest, payments on account, etc..... 170**

Clause 5-1.	Duty of the assured to provide information and documents .....	170
Clause 5-2.	Claims adjustment.....	172
Clause 5-3.	Rates of exchange .....	173
Clause 5-4.	Interest on the compensation .....	174
Clause 5-5.	Disputes concerning the adjustment of the claim .....	176
Clause 5-6.	Due date .....	178
Clause 5-7.	Duty of the insurer to make a payment on account .....	178
Clause 5-8.	Payment on account when there is a dispute as to which insurer is liable for the loss .....	179

#### **Section 2 Liability of the assured to third parties ..... 180**

Clause 5-9.	Duties of the assured when a claim for damages covered by the insurance is brought against him .....	180
Clause 5-10.	Right of the insurer to take over the handling of the claim .....	181
Clause 5-11.	Decisions concerning legal proceedings or appeals.....	181
Clause 5-12.	Provision of security .....	183

#### **Section 3 Claims by the assured for damages against third parties ..... 184**

Clause 5-13.	Right of subrogation of the insurer to claims by the assured for damages against third parties.....	184
Clause 5-14.	Waiver of claim for damages.....	189
Clause 5-15.	Duty of the assured to assist the insurer with information and documents .....	189
Clause 5-16.	Duty of the assured to maintain and safeguard the claim .....	190
Clause 5-17.	Decisions concerning legal proceedings or appeals.....	191
Clause 5-18.	Salvage award which entails compensation for loss covered by the insurer .....	191

<b>Section 4 Right of the insurer to take over the object insured upon payment of a claim.....</b>	<b>192</b>
Clause 5-19. Right of the insurer to take over the object insured.....	192
Clause 5-20. Charges on the object insured.....	194
Clause 5-21. Preservation of the object insured.....	196
Clause 5-22. Right of subrogation of the insurer in respect of damage to the object insured.....	196
 <b>Section 5 Limitation etc. ....</b>	 <b>198</b>
Clause 5-23. Time-limit for notification of a casualty.....	199
Clause 5-24. Limitation.....	200
Clause 5-25. Rules regarding claims notice and limitation for insurance contracts subject to Finnish law and jurisdiction.....	202
 <b>Chapter 6 Premium .....</b>	 <b>202</b>
Clause 6-1. Payment of premium.....	204
Clause 6-2. Right of the insurer to cancel the insurance in the event of non-payment of premium.....	205
Clause 6-3. Premium in the event of total loss .....	205
Clause 6-4. Additional premium when the insurance is extended.....	207
Clause 6-5. Reduction of premium .....	209
Clause 6-6. Reduction of premium when the <i>vessel</i> is laid up or in similar situations.....	209
Clause 6-7. Claim for a reduction of premium .....	211
 <b>Chapter 7 Co-insurance of mortgagees .....</b>	 <b>212</b>
Clause 7-1. Rights of a mortgagee against the insurer.....	213
Clause 7-2. Amendments and cancellation of the insurance .....	215
Clause 7-3. Handling of claims, claims adjustments, etc.....	216
Clause 7-4. Payment of compensation.....	216
 <b>Chapter 8 Co-insurance of third parties.....</b>	 <b>218</b>
Clause 8-1. Rights of third parties against the insurer .....	221
Clause 8-2. Protection of third parties against subrogation claims from the insurer .....	222
Clause 8-3. Application of the rules in Chapter 3 and Cl. 5-1 .....	224
Clause 8-4. Amendments and cancellation of the insurance contract.....	225
Clause 8-5. Handling of claims, claims adjustment, etc. ....	225

Clause 8-6.	Other insurance .....	225
Clause 8-7.	Independent co-insurance of mortgagees or named third parties .....	226

## **Chapter 9 Relations between the claims leader and co-insurers ..... 227**

Clause 9-1.	Definitions .....	228
Clause 9-2.	The right of the claims leader to act on behalf of the co-insurers.....	229
Clause 9-3.	Lay-up plan .....	231
Clause 9-4.	Notification of a casualty.....	231
Clause 9-5.	Salvage.....	233
Clause 9-6.	Removal and repairs .....	233
Clause 9-7.	Provision of security .....	234
Clause 9-8.	Disputes with third parties .....	236
Clause 9-9.	Claims adjustment.....	236
Clause 9-10.	Insolvency of a co-insurer.....	237
Clause 9-11.	Interest on the disbursements of the claims leader .....	238

# Part one

## RULES COMMON TO ALL TYPES OF INSURANCE

# Chapter 1

## Introductory provisions

### General

A number of provisions of a general nature, which are difficult to fit into the Plan's system in any other way, are compiled in this Chapter. While the solutions in the 1964 Plan have essentially been maintained in the Chapter, Cl. 1-3 regarding contracts entered into through a broker is new, and Cl. 1-4A regarding jurisdiction and choice of law has been expanded. **In the 2019 Version an arbitration clause was added as Cl. 1-4B.**

#### Clause 1–1. Definitions

This Clause was amended in 2016. The definitions of “loss” and “particular loss” in previous versions were deleted and a new definition of “broker” was added in sub-clause (d).

Sub-clauses (a), (b) and (c) remain unchanged. *Sub-clause (a)* requires no comments. *Sub-clause (b)* gives a definition of the term “the person effecting the insurance”. Norwegian insurance law distinguishes between “the person effecting the insurance”, who is the person entering into the contract with the insurer, and “the assured”, who is the person entitled to compensation from the insurer, cf. sub-clause (c). The person effecting the insurance and the assured will often be one and the same, but this is not necessarily the case, as for example where a charterer effects the insurance, whilst the shipowner is the assured.

The definition of “the assured” in *sub-clause (c)* corresponds to the definition in Nordic Insurance Contracts Acts (Nordic ICAs). The decisive criterion for having status as an “assured” under the insurance is that the person in question is in a position where he may have a right to compensation under the insurance contract, not that he in actual fact has such a right under the contract in question. Hence, the shipowner will have status as an assured, even if, for example, the ship's mortgage loans exceed the ship's insurable value, and the mortgagee will be entitled to the entire sum insured in the event of an insurance settlement. This is primarily significant in relation to the rules in the Plan which impose duties on the assured, cf. in particular the rules relating to the duty of care in Chapter 3 of the Plan.

In addition to the distinction between the person effecting the insurance and the assured, a distinction must be made between “the person effecting the insurance” and his authorised representative. A broker, agent or intermediary is not the person effecting the insurance, but the authorised representative of the person effecting the insurance (or of the insurer, if relevant).

*Sub-clause (d)* defines “broker” as the entity that is instructed by the person effecting the insurance to act as an intermediary between the person effecting the insurance and the insurer. The broker is engaged by the person effecting the insurance and is acting on his behalf, cf. Cl. 1-3, sub-clause 1. In general, the broker safeguards the interests of the person effecting the insurance.

## **Clause 1–2. Policy**

Sub-clause 1, first sentence, was editorially amended in 2016 replacing the term “require” with “demand”.

*Sub-clause 1, first sentence*, states that the person effecting the insurance may demand that a policy be issued. A “policy” according to the Plan is the insurer’s written confirmation of the insurance contract. The term “policy” in the Plan corresponds to an “insurance certificate” under Nordic ICAs. However, the term “policy” is so firmly established in marine insurance that it was deemed expedient to retain it. In contrast to the provisions contained in Nordic ICAs, the insurer has no obligation to issue a policy unless the person effecting the insurance demands him to do so. Frequently, other documents will have been issued which replace the policy, cf. below under Cl. 1-3, in which event a policy would be superfluous.

In previous Plan versions, policy was used as a term both to describe the insurer’s written confirmation of the insurance contract as stated in Cl. 1-2 and as a reference to the insurance contract with the inclusion of the individual policy, the conditions and other documents. This was somewhat confusing, in particular because in today’s insurance market a policy is not always issued. The 2016 Version makes a distinction between the policy as defined in Cl. 1-2 and the term “insurance contract”, which refers to the individual agreement between the person effecting the insurance and the insurer in general, thereby including both the policy - if issued - and the conditions. The distinction entails no substantive amendment. The purpose is to avoid using the term policy as a reference to the insurance contract in general. A formal policy is today in less demand due to data processed insurance documentation sufficiently evidencing the content of the insurance contract without necessitating a subsequent written confirmation issued by the insurer.

Thus, in 2016 the term “policy” was replaced with the term “insurance contract” in the Plan and its Commentaries where the term was referring to the all documents included as part of the insurance contract and not only the individual confirmation. This amendment is made in the following clauses: 4-8, 5-3, 8-2, 12-15, 12-16, 12-18, 13-4, 14-1, 14-2, 15-3, 15-15, 16-4, 16-6, 16-7, 16-12, 17-1, 17-3, 17-15, 17-18, 17-28, 17-31, 17-34, 17-55, 18-1, 18-32, 18-33, 18-38, 18-39, 18-40, 18-46, 18-48, 18-49, 18-54, 19-2, 19-5, 19-8, 19-9, 19-10, 19-25 and 19-26. It should be noted that the concept “insurance contract” also includes the conditions in the Plan as part of the contract, cf. the discussion under Cl. 3-22, sub-clause 1.

The concept of a “policy” as defined in Cl. 1-2 must be distinguished from the concept of the document in which the broker confirms details of the insurance placement (in practice called “Cover Note”, “Evidence of Cover” or similar). An appointed broker issues confirmation of cover containing all relevant insurance conditions, either as a complete text or by way of reference, which is sent to the person effecting the insurance. The confirmation shall mirror the terms of the insurance agreement entered into with the insurer.

*Sub-clause 1, second sentence*, relating to the content of the policy, and the *third sentence* concerning the possibility of relying on the assumption that no other conditions apply than those appearing from the policy, corresponds to sections in the relevant Nordic ICAs. The rule to the effect that the insurer cannot invoke conditions to which no reference is made in the policy is a natural equivalent to the principle that the person effecting the insurance will be bound by the policy unless he raises an objection, cf. sub-clause 2. However, it would not be expedient to prevent the insurer entirely from invoking provisions that do not appear in the policy or the references contained in it. If the insurer can prove that the person effecting the insurance was aware of the relevant condition and that this was to form part of the contract, the parties’ agreement shall prevail over the written contract, cf. in this respect also the solution contained in Nordic ICAs.

Nordic ICAs lay down detailed requirements concerning the conditions that must be incorporated in the policy. These requirements are not sufficiently flexible for marine insurance. *Paragraph 2* corresponds to § 2, second paragraph, of the 1964 Plan, but has been somewhat rewritten.

Sections in the Nordic ICAs also contain a number of rules relating to the insurer’s duty of disclosure. This type of rule is not required in marine insurance.

### **Clause 1–3. Contracts entered into through a broker**

This Clause was amended in 2016. Sub-clause 1 was rewritten based on the new definition of “broker” in Cl. 1-1 (d). The new sub-clause 1 replaced both sub-clauses 1 and 2 in earlier versions of the Plan. In sub-clause 2 (former sub-clause 3), first sentence, the word “requires” was replaced with “demands” and new sub-clauses 3 and 4 was added.

*Sub-clause 1* emphasizes that the broker acts on behalf of the person effecting the insurance in all cases except those where the insurer has given written authority to the broker to perform a specific function on behalf of the insurer. This provision conforms with general principles of contract law.

*Sub-clause 2* must be seen in conjunction with Cl. 1-2 concerning the policy. The *first sentence* imposes a duty on the broker to assist in obtaining a policy if the contract was entered into through a

broker. If the broker acts on behalf of the insurers, he can to the extent that he has the necessary authority issue a common policy so that it will not be necessary for the person effecting the insurance to obtain a policy from each insurer. In that event, it should be clearly evident from the policy that it is issued by authority and on whose behalf the broker is signing, cf. *second sentence*.

If the broker fails to state these facts, he risks becoming directly liable under the insurance contract. If the broker issues the policy on behalf of the insurer, he is acting as the representative of the insurer, and not of the person effecting the insurance. Any errors on the part of the broker in connection with the issuance of the policy will therefore be the insurer's risk.

If a policy is issued, the duty to raise objections set forth in Cl. 1-2, sub-clause 2, shall apply. This means that the person effecting the insurance must check the policy against any underlying agreement to see if the policy is correct. If the policy differs from the underlying agreement, and the person effecting the insurance fails to object, he risks that the policy takes precedence over the agreement.

*Sub-clause 3* gives the broker authority to receive premium returns or claims settlements. The purpose of the new clause is to simplify the documentation procedures for the parties. The insurer does not need to obtain confirmation of the broker's authority every time any payment shall be made, provided always that the loss payee provision in the insurance contract is followed. It also follows that any payment by the insurer is binding also on the person effecting the insurance and/or the assured. Second sentence of sub-clause 4 makes it clear that the person effecting the insurance and/or the assured at any time may change or withdraw the power of attorney. In this event, the insurer must pay directly to the person effecting the insurance or the assured as appropriate. Return of premium will normally be made to the person effecting the insurance as the party responsible for payment of the premium, cf. Cl. 6-1. Settlements of claims will normally go to the assured, being the party entitled to compensation of claims, cf. Cl. 1-1 (c). Any change or withdrawal of the broker's authority to receive payments from the insurer will only take effect upon his receipt of the notice. The notice may be sent through the broker, but will not take effect until the broker conveys the notice to the insurer. Therefore, if it is a matter of urgency it is advisable to send the notice directly to the insurer.

*Sub-clause 4* applies to premium payments. The person effecting the insurance will normally wish to pay the premium via his broker and leave it to the broker to distribute the premium to the participating insurers. As reiterated in sub-clause 5, according to sub-clause 1 the broker shall be deemed to act on behalf of the person effecting the insurance. In this context, payment of premium to the broker does not satisfy the duty of the person effecting the insurance to pay the premium to the insurer. If the broker for some reason does not forward the premium to the insurer, this is the risk of the person effecting the insurance. Interest on overdue premium according to Cl. 6-1, sub-clause 2, may accrue, and in a worst-case scenario the person effecting the insurance may have to pay the premium once again to the insurer if e.g. the broker should be declared bankrupt.

## Clause 1–4A. Jurisdiction and choice of law

This Clause was amended in the 2013 Plan to adapt the Plan to its future application in Denmark, Finland and Sweden. The word “Nordic” in Cl. 1-4A embraces only Denmark (including Greenland and the Faroe Islands), Finland (including Åland), Norway and Sweden. Iceland is a non-Nordic country in the context of Cl. 1-4A. **In the 2019 Version of the Plan, sub-clause 2 was amended and a new Cl. 1-4B on arbitration inserted, see below on this Clause.**

The solution set out as standard in this Clause is that any dispute arising out of the contract can be settled by commencing proceedings against the claims leader. Chapter 9 defines the powers of the claims leader. These do not extend to all matters concerning the insurance, and the Commentary to Cl. 9-1 mentions that in practice it is sometimes necessary to make a distinction between the “rating leader” and the “claims leader”. The former has the power to bind following insurers in such matters as premium adjustments due to changes in vessel values, additional premiums for breach of trading warranties, rating of additional vessels and similar matters. It is not always the case that the same insurer is both rating and claims leader and in some cases there may be separate rating leaders for different geographical markets. It is not possible in a standard contract such as the Plan to provide solutions for all the various arrangements that assureds and their brokers might find most suitable for their requirements.

*Sub-clause 1* regulates jurisdiction and background law for any conflict associated with an insurance contract effected on Plan conditions and with a Nordic claims leader. There are similarities between the laws of the four Nordic countries, mainly as a consequence of co-operation in certain areas of private law including insurance, but each country has its own completely independent legislature and court system. Cl. 1-4A uses the term “law and venue of the claims leader”. If the claims leader is Norwegian then Norwegian law will govern the insurance contract, and any dispute will be subject to the jurisdiction of the court where the claims leader has its head office. Correspondingly, if the claims leader is Danish with its head office in Copenhagen, the insurance contract is governed by Danish law and disputes must be referred to the court which according to Danish law is the competent court. The rules in sub-clause 1 and 3 are in accordance with the provisions contained in Article 9 (1) (a) and (c) of the Lugano Convention, which provides that both the claims leader and the co-insurer may be sued in the claims leader’s State of domicile. On the other hand, the assured is precluded from invoking against the Nordic claims leader the other venue rules contained in Article 9 of the Lugano Convention, as well as the other venue rules contained in Section 3. This departure from the Convention is valid as it concerns insurance related to ocean-going ships or offshore structures, cf. Article 13 (5) cf. Article 14 of the Lugano Convention.

The Insurance Contract Act of the relevant Nordic country becomes applicable as background law. However, there are very few rules in the ICAs of the Nordic countries that are mandatory for this type

of marine insurance. The relevant ICA must be subordinate to the wording of the insurance contract and Plan conditions including solutions that follow by necessary implication. Nor is it necessary to state that the individual insurance contract takes precedence over the provisions of the Plan.

Background law includes the rules governing sources of law and methodology of the relevant Nordic country. These will thus determine any issue concerning precedence between the various sources of law.

The provisions also apply where a non-Nordic assured enters into an agreement with a Nordic claims leader on Plan conditions. In such cases, the assured may wish to have the right to institute proceedings in his home country. There is nothing preventing the parties from entering into such agreement provided it is in writing; a verbal agreement is not sufficient, cf. sub-clause 4 and below. If no agreement in writing has been made, sub-clause 1 prevails and the venue where the claims leader's head office is located must be used. Nor is there anything to prevent the parties from agreeing in writing on the background law of another country. However, it must be emphasized that the Plan is very closely bound up with the law and practice of the Nordic countries, especially Norway. Applying any other law as background law will normally give rise to considerable difficulties. *Sub-clause 4* states that the provisions in sub-clause 1 may only be departed from if the insurer gives his written consent. The provision applies both to choice of law and jurisdiction. Under Finnish and Swedish law any marine insurance dispute must be placed before the local official adjuster before the dispute can be brought before the domestic courts. Cl. 1-4A will of course be subordinated to applicable local mandatory statutes. See further Cl. 5-5 and the Commentary to this Clause.

***Sub-clause 2 was amended in the 2019 Version. The previous clause stated that the default choice of law was Norwegian, but had no regulation of jurisdiction. The amended clause states that disputes in such cases are referred to arbitration according to Cl. 1-4B, where place of arbitration and background law for the non-Nordic claims leader is regulated in sub-clause 4. The reason for the amendment is given in the Commentary to this clause. In relation to background law, the reference to Norwegian law is retained for arbitration in non-Nordic countries.***

*Sub-clause 3* allows an assured to sue the co-insurers in the claims leader's venue. In contrast to sub-clause 1, this is an option (cf. the words "may **be sued**"). The assured may instead institute proceedings where the various co-insurers are domiciled or any other available jurisdiction. The provision does not apply only to the claims leader's general venue (home venue). It is also possible to sue the co-insurers in all the venues where the claims leader, according to law or contract, is obliged to accept lawsuits. **However, this option presumes that Cl. 1-4A applies. If the parties have agreed arbitration according to Cl. 1-4B, obviously sub-clause 3 does not apply. Further, according to Cl. 1-4A, sub-clause 2, arbitration is the default rule for a non-Nordic claims leader. This means**

**that sub-clause 3 only applies if the insurance is effected with a non-Nordic claims leader and the parties have agreed ordinary court proceedings with a specific jurisdiction.**

The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. This is in keeping with the approach of the Norwegian 1996 Plan. Nevertheless the Commentary shall still carry more weight as a legal source than is normally the case with the Traveau Preparatoire of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Nordic Revision Committee, and it must therefore be regarded as an integral component of the standard contract which the Plan constitutes. However, in case of any obvious conflict between the Plan text and the Commentary, the text shall prevail as the primary legal source over the Commentary.

## **Clause 1–4B. Arbitration Clause**

**Cl. 1-4B was new in the 2019 Version.**

**There are two main reasons to insert an arbitration clause as an alternative to ordinary court proceedings. The first reason is that several insurers today refer to arbitration as their main dispute resolution solution, and it is therefore convenient to have a standard clause in the Plan that the parties can include.**

**The second reason concerns uncertainty of the regulation on court jurisdiction and recognition and enforcement of judgments after Brexit. The EU legislation on court jurisdiction and recognition and enforcement of judgments in civil and commercial law is based on the revised Brussel I Directive of 2012, which is applicable also for Norway and Denmark through the Lugano Convention of 2007. The UK is however not a signatory party to the Lugano Convention, and this creates uncertainty about recognition and enforcement of EU/EFTA court decisions in the UK and UK court decisions in the EU/EFTA states. This is primarily a problem when the insurance is effected with non-Nordic claims leaders where jurisdiction in the UK often is a natural choice. The committee is therefore of the view that it is more convenient to refer disputes with non-Nordic claims leaders to arbitration, where recognition and enforcement is based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), cf. Cl. 1-4A, sub-clause 2. It should however be noted that this may also be a problem for Nordic claims leaders in cases where there are co-insurers domiciled in the UK, and the question will be enforcement of Nordic judgments against such co-insurers. Even so, the default rule for this situation is ordinary court proceedings, cf. below.**

***Sub-clause 1* states that “If the parties have agreed in writing that disputes shall be solved by arbitration, the following applies instead of Cl. 1-4A”. This means that the ordinary jurisdiction and background law Clause applies if the parties have not made a specific agreement to the**

contrary. The reason for keeping this solution as the default rule is that it is uncertain to what extent the Nordic shipowners in fact want to refer all disputes to arbitration. As mentioned above under Cl. 1-4A, sub-clause 1, with reference to sub-clause 4, there are rules in Finnish and Swedish law stating that any marine insurance dispute must be placed before the local official adjuster before the dispute can be brought before the domestic courts. A reference to arbitration would depart from this system and this may not be a preferable choice.

*Sub-clause 2* is the Nordic Offshore and Maritime Arbitration Association's (Nordic Arbitration) arbitration clause sub-clause 1 and 3. The Nordic Maritime and Offshore Arbitration Association was established in 2017, and has developed arbitration regulation and best practice guidelines to fit Nordic legal tradition and culture. It is therefore convenient to refer arbitration to this system.

*Sub-clause 3* regulates the place of arbitration and background law for an insurance effected with a Nordic claims leader, and conforms to the regulation in Cl. 1-4A, sub-clause 2.

*Sub-clause 4* regulates the place of arbitration and background law for an insurance effected with a non-Nordic claims leader. It follows from Cl. 1-4A, sub-clause 3, that this rule applies as a default rule if the parties have not made a specific agreement on jurisdiction, forum and choice of law. If jurisdiction is not agreed, the case is referred to arbitration in Oslo, cf. first sentence. In this case, it follows from the second sentence that Norwegian background law applies. However, if the parties have agreed to arbitration in another Nordic country it is more natural to apply the law of this country. This solution also conforms to the provision for Nordic claims leaders in sub-clause 3. If the parties have agreed on arbitration in a non-Nordic country, however, the background law is again Norwegian. The Plan is mainly based on Nordic and Norwegian law and practice, and it is not convenient to combine the Plan with another legal system, cf. above on the Commentary to Cl.1-4A, sub-clause 1. If the parties have agreed on ordinary court proceedings and jurisdiction but not agreed on background legislation, Cl. 1-4B, sub-clause 4, on Norwegian background law should be applied by analogy.

According to *sub-clause 5*, any changes in the terms of the agreement set out in sub-clauses 2, 3 and 4 must be in writing. This conforms to Cl. 1-4A, sub-clause 4.

## **Clause 1–5. Insurance period**

This provision corresponds to Cl. 4 of the 1964 Plan and relevant sections of the Nordic Insurance Contracts Acts (Nordic ICAs). Sub-clause 4 was added in the 2003 Version of the 1996 Plan.

Sub-clause 4 was further amended in the 2007 version in connection with the amendment to Cl. 12-2.

Changes were also made in the Commentary. The specification of the time in sub-clause 2 was changed in the 2010 version, at which time changes were also made in the Commentary on sub-clause 3.

The rule contained in *sub-clause 1* is new and corresponds to relevant Nordic ICAs, relating to term of liability. The Nordic ICAs contain more detailed rules than Cl. 4 of the 1964 Plan relating to the inception of the insurance. These do not fit in very well with marine insurance. This applies in particular to rules which governs the insurer's liability in those cases where it is clear that the request for insurance will be granted by the insurer.

*Sub-clause 2* corresponds to Cl. 4 of the 1964 Plan, but the wording is derived from relevant Nordic ICAs. However, the time is tied to Coordinated Universal Time (UTC). The time specified for cessation of liability in sub-clause 2, *second sentence*, was changed in the 2010 version from 24:00 hours to 23:59:59 hours because the time 24:00 hours does not exist. This provision shall only apply if nothing else is agreed by the parties. If an insurance is transferred upon termination from one insurer to another, it is important that the parties take into account any differences in times in the insurance conditions in order to avoid creating periods of time with no cover.

Relevant Nordic ICAs provide that the insurer cannot reserve the right to amend the conditions during the insurance period. However, this is not a mandatory rule for marine insurance. If the insurer wants to make such a reservation, this will accordingly take precedence over the rule contained in Nordic ICAs.

The rule contained in *sub-clause 3* is new, and relates to relevant Nordic ICAs, which set out the rule concerning the insurer's duty to give notice if he does not wish to renew the insurance. Failure to give notice results in the insurance contract being renewed for one year. In marine insurance the insurer should, however, be free to decide whether or not to renew the insurance, see the *first sentence*, which introduces a point of departure that is opposite to that applied in relevant Nordic ICAs: the insurance is terminated unless otherwise agreed. The reference to Cl. 1-2 entails that the rules relating to documentation and the duty to raise objections are correspondingly applicable in the event of a renewal.

The question of an extension of the insurance when the ship has sustained damage which must be repaired for the purpose of making it compliant with technical and operational safety requirements and it is uncertain whether the assured is entitled to claim for a total loss is governed by Cl. 10-10 and Cl.11-8.

Rules relating to extension where the insurance terminates because of notice of termination or certain other circumstances are included in the relevant rules on termination, see Cl. 3-14, sub-clause 2,

Cl. 3-17, sub-clause 1, third sentence, and Cl. 3-27. The duration of a voyage insurance is regulated in Cl. 10-9.

If the ship has changed hull insurer and there is doubt as to whether damage is to be covered by the former or latter insurer, the question will normally have to be decided on the basis of the rules contained in Cl. 2-11. Both insurers will, in that event, be obliged to make a proportionate payment on account, cf. Cl. 5-7.

*Sub-clause 4* was added in the 2003 version, and a further addition was made to it in the 2007 version. The provision solves a previously controversial issue concerning the period of insurance in connection with multi-year insurance contracts. Insurance normally runs for one year at a time, and many of the provisions in the Plan stipulate an insurance period of one year. Recently, however, multi-year insurance contracts have become increasingly common, giving rise to the question of whether the insurance period is to consist of the entire term of the insurance contract, or whether the point of departure is to be an insurance period of one year.

The provision states that if the parties have agreed that the insurance is to attach for a period longer than one year, the insurance period shall nevertheless be deemed to be one year in relation to certain provisions. This applies to Cl. 2-2 regarding the calculation of insurable value, Cl. 2-11 regarding incidence of loss, Cl. 5-3, last sub-clause, regarding calculation of rates of exchange, Cl. 5-4, sub-clause 3, regarding calculation of interest on the compensation, Cl. 6-3, sub-clause 1, regarding payment of premium in the event of total loss, Cl. 12-2 regarding the right to cash compensation, Cl. 16-1, sub-clause 3, regarding calculation of the loss of time, **sub-clause 4, regarding calculation of reinstatement premium** and Cl. 16-14 regarding liability for repairs carried out after expiry of the insurance period. Further comments on the rule may be found under the respective provisions.

If the insurance period has been fixed in full years, the provision poses no problem. Starting from the date on which the insurer's liability attaches, the total period is then divided into two or more one-year periods. In practice, however, one finds examples of insurance periods consisting of one or more full years with additional months, e.g. 1 ½ years, or 3 years and 3 months. In these cases, too, each full year or 12-month period is calculated individually from the date on which the insurance was effected; the "extra" time that does not constitute a full year then becomes a separate insurance period consisting of the relevant number of months.

On the other hand, the entire term of the insurance contract must be regarded as the basic insurance period in relation to Cl. 6-4 and Cl. 6-5 of the Plan regarding the increase/reduction of premium, and Cl. 10-10 and Cl. 11-8 regarding extension of the insurance. The same applies with regard to the question of renewal, cf. Cl. 1-5, sub-clause 3, and Cl. 17-2. Under the 2003 version, this also applied to Cl. 18-10 regarding the right to compensation for damage to offshore structures. However, the

provision in Cl. 18-10 was deleted in the 2007 version because it was rendered superfluous by the general rule regarding the right to compensation that was added in Cl. 12-2 of the 2007 version. In relation to Cl. 12-2, it has been decided that the “end of the insurance period” means the end of a one-year period, cf. the Commentary on this provision.

The main rule, therefore, is to divide up the total term of the insurance contract into several insurance periods or periods of one year in relation to certain provisions, while otherwise retaining the basic principle that the insurance period is the entire term agreed upon in the insurance contract.

This provision only applies where an insurance period longer than one year is agreed. If an insurance period shorter than one year is agreed, this shorter period also applies in relation to the aforementioned provisions.

## Chapter 2

### General rules relating to the scope of the insurance

#### Section 1

##### Insurable interest and insurable value

#### General

This Section corresponds to Chapter 2, Section 1, of the 1964 Plan.

Cl. 5 of the 1964 Plan contained a provision as to what interests were deemed to be covered. This provision has been deleted; the scope of the relevant insurance will appear from the rules relating to the individual lines of insurance. It is nevertheless not the intention to change the reality behind the provision, *viz.* that it is not the object itself, but the assured’s economic interest in the object, which is covered by the insurance. The interest terminology is a practical means of creating flexibility and variation in the insurance. In particular, it must be emphasized that it is possible to let several persons each insure their separate interest in the object (e.g., owner and mortgagee), and it is relatively simple to state the items of loss in respect of which the assured may claim cover under each individual insurance (the interest in the ship’s capital value is covered by hull insurance, the income interests by freight insurance).

However, attention should be drawn to the fact that the word “interest” is also used with a somewhat different meaning in marine insurance, *viz.* as a designation of certain capital or income interests which are not covered by the ordinary hull or freight insurance, cf. Chapter 14 relating to hull and freight interest insurances.

## Clause 2-1. Insurance unrelated to any interest

This provision is identical to Cl. 6 of the 1964 Plan.

The provision establishes the traditional precondition for a valid insurance contract, i.e. that the assured must have an economic interest in the subject-matter insured. A “wager insurance”, where it has been clear from the outset that no insurable interest existed, is therefore invalid. Similarly, the assured must be precluded from invoking the insurance after he has ceased to hold the interest, for example, when the ship is definitely confiscated or passes to a new owner. Nor will the new owner of the ship normally acquire the position of assured under the insurance contract, cf. Cl. 8-1, sub-clause 1, to the effect that the assured must be specifically named in the contract, and cf. Cl. 3-21 relating to change of ownership.

The question regarding insurance unrelated to any interest is currently not regulated in relevant Nordic Insurance Contracts Acts (Nordic ICAs), but the same result follows from Section 12 of the Norwegian Act no. 11 of 22 May 1902 relating to the coming into force of the penal code (*Straffelovens ikrafttredelseslov*). The fact that the corresponding provision has been lifted out of the Norwegian ICA could be an argument in favour of it also being deleted from the Plan. There is a need for some information on the interest as the subject-matter of insurance in the Commentary regardless, however, and the provision should therefore remain for pedagogical reasons, particularly with regard to those assureds who are not familiar with the Norwegian market.

The provision is based on the traditional principle that it is not the object itself, but the assured’s economic interest in the object, which is the subject-matter of the insurance. It is, however, difficult to determine the requirements the interest must meet in order to be insurable. A point of departure may be that it must be possible to base the interest on any existing economic relationship between the assured and the ship (owner, mortgagee, charterer, user, requisitioner). Further, the interest must have economic value so that the assured will suffer an economic loss if the interest is destroyed. However, a certain margin must be given for subjective assessments in the valuation of the interest. Accordingly, it is not a requirement that the interest must have a value which is measurable according to objective criteria. When agreed insurable values are used, the assured’s own assessment of the interest must carry substantial weight. The necessary guarantee against abuse is implicit in the rules relating to revision of the valuation, cf. Cl. 2-3.

The provision contained in Cl. 2-1 does not solve the question whether the interest is “legal”, cf. former Section 35 of the ICA, currently NL 5-1-2. This question is essentially solved in the Plan through Cl. 3-16 relating to illegal activities. If the legality of the assured’s interest is at issue in relation to matters other than the use of the vessel for illegal purposes, the question must be decided on the basis of the criteria that apply generally in insurance law, cf. NL 5-1-2. In the application of the

rule, due regard must be had to the nature of the provisions that are breached, the extent of the illegal activities, the extent to which the assured is aware of the facts, the connection between the illegal situation and the interest insured, and whether there is causation between the illegal situation and the damage.

## **Clause 2-2. Insurable value**

Sub-clause 1, second sentence, and sub-clause 2 were added in 2016.

Sub-clause 1, first sentence, states that the insurable value is the full value of the interest at the inception of the insurance. This provision differs from general insurance law, where the insurable value is determined at the time of loss, cf. relevant Nordic Insurance Contracts Acts. The reason for the special rule in marine insurance was that it might be difficult to determine the value at the time of loss if the ship was far away. With today's communications systems, there is every possibility of determining the value at the time of the loss, regardless of where the ship might be. Nevertheless, the traditional solution in marine insurance has been maintained on this point.

Further rules governing the time for the "inception of the insurance" are contained in Cl. 1-5 of the Plan. The time poses no problems for ordinary insurance contracts with a term of one year. If it has been agreed that the insurance is to attach for a period of more than one year, it follows from Cl. 1-5, sub-clause 4, which was added in the 2003 version, that the insurance period is to be deemed to be one year in relation to Cl. 2-2. Further details regarding the calculation of the various insurance periods are set out in the Commentary on Cl. 1-5.

As regards some interests, the value will be explicitly regulated in the various insurance conditions. This is not the case with hull insurance, in which it is the market value which forms the basis for the calculation of the insurable value.

In loss-of-hire insurance, cf. Chapter 16, it seems more natural to have an insurable value for the anticipated daily income, cf. Cl. 16-5, and tie the total limitation of the insurer's liability to a certain number of days.

If the parties do not agree to fix the insurable value, the insurable value is called "open". According to sub-clause 1, second sentence, the parties may by agreement fix the insurable value at a certain amount to avoid discussion on the market value at any given time. For ocean-going vessels, agreement on the insurable value is rather common. A fixed insurable value is called agreed insurable value, cf. Cl. 2-3, and corresponds to a "valued policy" or "agreed value" in the English market.

Sub-clause 2 states that the sum or sums insured in the insurance contract shall be deemed to constitute agreed insurable value(s) unless the circumstances clearly indicate otherwise.

The term “circumstances” is taken from Cl. 16-6, and refers to matters or arguments that are relevant for the interpretation of the insurance contract. Examples are information from the negotiation between the parties, indicating that the intention of the parties was to keep the value open. The term circumstances in this respect does not include circumstances occurring after the contract is entered into, which may subsequently lead to a change in the value of the vessel.

In such case, the value must be renegotiated by the parties or amended in accordance with Cl. 2-3.

### **Clause 2–3. Agreed insurable value**

The word “assessed” was replaced with “agreed” throughout the Plan and the Commentary in 2016.

#### **Sub-clause 2 was amended in the 2019 Version.**

Cl. 2-3 regulates the extent to which an agreed insurable value is binding on the insurer. For the shipowners, it is important that a valuation is unconditionally binding on the insurer: an expanding shipowner’s building programme is based on the ships’ current freight income or, if a ship is lost, on its insured value, and the mortgagees as well need to know that they can rely on the hull valuation.

The provision applies to all types of insurance. The term “the subject-matter insured” must therefore in this connection be interpreted to be synonymous with “the interest insured”.

Under this provision, the insurer may challenge the valuation even if the person effecting the insurance has given his information in good faith. As regards the determination of the valuation, the insurer should have an unconditional right to be given correct information, and the risk of any errors should lie with the person effecting the insurance.

If misleading information has been given about the properties which are material to the valuation, the valuation will be “set aside”. This means that the agreed valuation ceases to be in effect in its entirety, so that the value of the object insured must be determined according to the rule relating to open insurance value in Cl. 2-2, i.e. the full value of the interest at the inception of the contract. It is, in other words, not sufficient to reduce the valuation to the highest amount that would have been acceptable without conflicting with Cl. 2-3.

In relevant Nordic ICAs, reference is made to the rules relating to the duty of disclosure in the event that the person effecting the insurance has given incorrect information of importance for the valuation. In marine insurance, however, the rules relating to the duty of disclosure in Cl. 3-1 *et seq.* are not

applicable to misleading information which is only of importance for the determination of the valuation. The consequences of the misleading information in such cases are exhaustively regulated in Cl. 2-3; there is no need for further sanctions in the form of exemption from liability or cancellation of contract as allowed by the rules relating to the duty of disclosure. However, in the event of fraud, it follows from general rules of contract law that the agreement is void. And if information has been given which is misleading in relation to the valuation as well as significant for the actual effecting of the insurance, the insurer will obviously, in addition to a reduction of the valuation, have the right to invoke Cl. 3-1 *et seq.* concerning exemption from liability for damage and, possibly, cancellation of the insurance.

The provision only regulates the setting aside of an excessively high valuation. The insurer should not have the right to demand that a valuation which is clearly too low be set aside with the effect that under-insurance will arise in the event of partial damage. Such a demand will hardly have any legitimate basis: to cover repair costs he has received a premium (casualty premium), which is determined on the basis of the size, type and age of the ship, in principle independently of the valuation.

*Sub-clause 2* **was amended in the 2019 Version and establishes a right for both parties to demand an adjustment of the agreed insurable value** in the event of a **significant** change in the value of the **interest** insured resulting from **change in fundamental expectations upon which the insurance contract was based**. **There must have been a change that is unrelated to the acts or influence of either of the parties and the change must be of a kind that affects the express or clearly implied assumptions that were the basis for the parties' agreement about the insured vessel's value**. **If the agreed insurable value is based on the current market value of the vessel and there is a significant change of the market value after the insurance contract was entered into, both parties may require a change of value**. **If on the other side the basis for the insurable value was mainly based on the contractual arrangements for the vessel, market fluctuation might not be relevant**. **The same must apply if the insurable value was agreed on the basis of outstanding loan arrangements with a bank**. It is only the valuation which can be changed in this manner; the insurance contract remains in force.

If the parties do not agree as to whether or not the conditions for an adjustment of the valuation are met, or about a new valuation amount, *sub-clause 3* provides that the decision shall be made by a Nordic average adjuster appointed by the assured.

#### **Clause 2–4. Under-insurance**

This Clause is identical to Cl. 9 of the 1964 Plan and corresponds to relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The provision maintains the principle of under-insurance if the sum insured is less than the insurable value, which means that the insurer shall merely compensate the part of the loss that corresponds to the proportion that the sum insured has to the insurable value, cf. *first sentence*.

Until 1989, the Plan rule relating to under-insurance was in accordance with the non-mandatory point of departure in Section 40 of the Norwegian Insurance Contracts Act 1930. The main rule has now been amended to insurance on first risk: “Unless otherwise provided in the insurance contract, the assured is entitled to full compensation for his economic loss”. However, most non-marine insurance conditions maintain the principle of under-insurance. The Committee considered whether the solution of the relevant Nordic ICAs should be followed in marine insurance, but reached the conclusion that the most expedient thing to do is to maintain the traditional point of departure of under-insurance. This is particularly due to the fact that, in marine insurance, co-insurance is common, and that the combination of the first-risk principle as a non-mandatory point of departure and the pro-rata principle for co-insurance seems unnecessarily complicated.

In so far as the insurable value has been agreed, the question of under-insurance will have already been determined when the insurance is effected. Furthermore, the rule relating to under-insurance does not apply merely to the actual compensation, but also to the insurer’s right to take over proceeds and claims against third parties, affecting the insured loss. This appears from Cl. 5-13, sub-clause 2, and Cl. 5-19, sub-clause 1, second sentence.

In relation to co-insurance, the rule applies only to co-insurance in the form of several parallel insurances where each individual insurer becomes liable for that proportion of the sum insured for which he is liable in relation to the aggregate insurable value. If the co-insurance is effected in the form of insurances in several layers, each layer must be regarded as an independent interest. It is therefore necessary to calculate a separate insurance value for each layer and look at the sum insured within the relevant layer in relation to the insurable value for that particular layer. The rules relating to under-insurance are applicable to co-insurers within the same layer, but not to the relationship between several co-insurers who are each liable for their own layer.

The provision contained in Cl. 2-4 does not regulate the question of the co-insurers’ liability in the event of collision damage, in view of the fact that there is no insurable value for such liability. However, it is generally assumed that the distribution of liability among the co-insurers must be based on the hull value.

**Clause 2-5. Over-insurance**

This provision is identical to the provision in Cl. 10 of the 1964 Plan. The same result follows indirectly from relevant Nordic Insurance Contracts Acts (Nordic ICAs).

*Sub-clause 1* is identical to the earlier provision and requires no comments. *Sub-clause 2* relating to fraud is not found in Nordic ICAs, but is in accordance with non-marine insurance conditions.

**Clause 2-6. Liability of the insurer when the interest is also insured with another insurer**

The provision corresponds to Cl. 11 of the 1964 Plan and relevant Nordic Insurance Contracts Acts (Nordic ICAs).

*Sub-clause 1* establishes the principle of primary joint and several liability in the event of “double insurance”, i.e. when the same peril is insured with two or more insurers, and corresponds to the rule contained in Cl. 11 of the 1964 Plan. Basically it corresponds to the Norwegian Insurance Contracts Act Section 6-3, first sub-clause: “If the same loss is covered by several insurances, the assured may choose which insurances he or she wishes to use until the assured has obtained the total compensation to which he or she is entitled”. However, the wording of relevant Nordic ICAs does not rule out subsidiarity clauses (clauses to the effect that one insurance is subsidiary in relation to another), while there is a desire in marine insurance to keep the door open for such clauses, cf. the Commentary on sub-clause below. The earlier wording to the effect that the insurer is liable “according to his contract” has therefore been maintained.

Sub-clause 1 is applicable to three situations. In the first place, it applies to double insurance in the form of ordinary co-insurance. Here the individual sums insured will in the aggregate correspond to the valuation and each individual insurer will be fully liable according to his contract, regardless of the fact that other insurances have also been effected (cf., however, Chapter 9, where a number of aspects of the internal relationship between the co-insurers are regulated).

In the second place, the provision becomes significant when there is “double insurance” in the traditional sense, i.e. where several parallel insurances are effected which in the aggregate will give the assured more compensation than the loss he has suffered. The provision in Cl. 2-6 establishes that, in this case as well, the insurers are primarily jointly and severally liable to the assured within the framework of the compensation to which he is entitled. The further settlement between the insurers is regulated in more detail in Cl. 2-7.

The third situation where there is double insurance is when a loss is covered partly under the primary cover of an insurance, partly as costs to avert or minimise the loss under another insurance.

In principle, this loss should be covered under the insurance which covers costs to avert or minimise the loss, cf. below under Cl. 2-7. But also here the assured must initially be entitled to claim damages from both insurers according to Cl. 2-6.

The size of the compensation to which the assured “is entitled” will depend on the insurance conditions. If the conditions authorize cover of varying amounts, it is the highest amount which is decisive for the size of the claim. Until the assured has recovered this amount, he may bring a claim against any of the insurers he wishes within the terms of the conditions which the relevant insurer has accepted.

The provision contained in sub-clause 1 is only applicable in the event of a conflict between two insurances covering the same peril. Hence, a conflict between an insurance against marine perils and an insurance against war perils is not a double insurance according to Cl. 2-6. Nor is it double insurance if the cover is divided into several layers. In the event of layer insurances, each layer must, as mentioned above in the Commentary on Cl. 2-5, be regarded as an independent interest. The insurer under one layer therefore does not become jointly and severally liable with the insurer under another layer, and a loss cannot be transferred from one layer to another if the insurer under one layer is, in exceptional cases, unable to cover a loss.

*Sub-clause 2* is new and regulates the settlement if one insurance has been made subsidiary. The rule here is that the insurer who has subsidiary liability is only liable for the amount for which the assured does not have cover with other insurers. It should be superfluous to say this in the Plan text; the solution follows from the actual subsidiarity principle and does not give rise to any particular problems. However, because of the special rule contained in sub-clause 3, see below, an explicit provision was found to be the most expedient.

If several insurances are made subsidiary, there is a risk that the assured may be left without settlement because both or all of the insurers may invoke their subsidiarity clauses. Accordingly, in such cases, there is a need for a rule to protect the assured. A rule of this type was previously contained in Section 43 of the Norwegian Insurance Contracts Act 1930, which imposed on the insurers a primary pro-rata liability or, in the alternative, joint and several liability. This provision was considered unnecessary under the system in the Norwegian ICA 1989. During the Plan revision, it was decided that in such cases a primary joint and several liability should be imposed on the insurers vis-à-vis the assured, see *sub-clause 3*, which makes sub-clause 1 similarly applicable.

Cl. 14 of the 1964 Plan contained a provision relating to the duty of the person effecting the insurance to disclose any other insurances he might have. The provision corresponded to Section 44 of the Norwegian ICA 1930, which was deleted in the revision of the Norwegian ICA in 1989, *inter alia* on the grounds that the general provision relating to the duty of disclosure of the person effecting the

insurance was sufficient to regulate the situation. The same will apply in marine insurance; furthermore, Cl. 2-5, sub-clause 2, relating to fraudulent over-insurance applies. The provision has, therefore, been deleted. If the insurer in a recourse settlement after the insurance event has occurred, should need to know about other insurances, he can ask the person effecting the insurance.

## **Clause 2–7. Recourse between the insurers where the interest is insured with two or more insurers**

This Clause corresponds to Cl. 12 of the 1964 Plan and relevant Nordic Insurance Contracts Acts (Nordic ICAs).

*Sub-clause 1* maintains the principle from Cl. 12, first sentence, of the 1964 Plan of a proportional apportionment among the insurers in the recourse settlement. The formulation is, however, somewhat simplified in relation to the 1964 Plan and corresponds to the wording of the Norwegian ICA Section 6-3, second sub-clause: “If two or more insurers are liable for the assured’s loss pursuant to the first sub-clause, the compensation shall be apportioned on a pro-rata basis according to the extent of the individual insurer’s liability for the loss, unless otherwise agreed between the insurers”. The 1964 Plan furthermore contained an assumption to the effect that “the total amount of the compensations for which the insurers, each according to his contract, would be liable in respect of the same loss” exceeded the compensation to which the assured was entitled. This condition is obvious and has therefore been deleted.

*Sub-clause 1* regulates the internal settlement among the insurers in the event of “double insurance” in the traditional sense, i.e. that the same interest is insured against the same peril with several insurers in such a manner that the total amount of the assured’s claims in connection with a certain loss exceeds the compensation to which he is entitled. When the assured has received what he is entitled to, the total amount of compensation shall be apportioned among the insurers according to the maximum amounts for which each of them was liable. This is an entirely internal settlement which does not concern the assured.

Within the individual type of insurance double insurance is not likely to arise very frequently. It would be by sheer accident that, for example, a shipowner were to take out hull insurance in excess of the valuation, or cover voyage freight twice. Cl. 13 of the 1964 Plan contained a provision granting the assured the right to demand a proportional reduction of the sum insured in such situations. It has apparently not been applied in practice, and no corresponding rule is contained in relevant Nordic ICAs. This provision has therefore been deleted.

If a salvage operation concerns different interests covered by different insurers, there will seemingly be double insurance as regards costs of measures to avert or minimise the loss. However, here the

rules in Cl. 2-6 and Cl. 2-7 are not applied; according to Cl. 4-12, sub-clause 2, each of the insurers is only liable for that part of the costs which is attributed on a proportional basis to the interest which he insures; in other words, there is no question of any apportionment under the rules of double insurance.

Cl.12, sub-clause 1, second sentence, of the 1964 Plan contained a rule to the effect that if an insurer was unable to “pay his share of the compensations, it is to be apportioned over the others according to the above rules, but each insurer is never obliged to pay more than the amount for which he was liable to the assured”. A similar provision in Section 42, first sub-clause, last sentence, of the Norwegian ICA 1930 was deleted, because it was regarded as unnecessary to encumber the statutory text with such detailed rules. The provision in the 1964 Plan is not referred to in the Commentary, and it has apparently not given rise to any problems in practice. It has therefore been deleted, also because the solution of a primarily pro-rata, in the alternative joint and several, liability follows from Section 2, second and third sub-clauses, of the Norwegian Act no. 1 of 17 February 1939 relating to instruments of debt (*gjeldsbrevsloven*) anyway, and must be considered to be the main rule relating to recourse liability in Norwegian property law.

The provision in *sub-clause 2*, is new and is attributable to the fact that joint and several liability is introduced for the insurers if all of them have reserved the right to subsidiary liability to the assured. In that event, a recourse settlement among the insurers will be necessary if one or more of them have initially been charged a higher amount than what their proportionate obligation indicates.

*Sub-clause 3* regulates double insurance where a loss is partly covered by the primary cover of an insurance and partly by another insurance's cover of costs of measures to avert or minimise the loss. A corresponding regulation is contained in the hull insurance conditions, cf. Cefor 1.4 and PIC Clause 5.10. In such cases, the loss should be covered under the insurance which is liable for costs of measures to avert or minimise the loss. It would therefore not be natural to apply the recourse rules contained in Cl. 2-7, sub-clause 1, to this situation, cf. sub-clause 3, first sentence, which establishes that the insurer who covers costs of measures to avert or minimise the loss shall, to the extent of his liability, bear the full amount of compensation payments in the recourse settlement. If the insurer who covers costs of measures to avert or minimise the loss has explicitly made his liability subsidiary in relation to other insurers, this must be respected in keeping with the solution in Cl. 2-6, sub-clause 2. If both the primary insurer and the insurer of costs of measures to avert or minimise the loss have reserved the right to full recourse against the other insurer, the situation will be as if both have declared subsidiary liability. The final loss must then be placed with the insurer who is liable for the costs of measures to avert or minimise the loss - so that the primary insurer will have full recourse against the insurer of costs of measures to avert or minimise the loss if he has initially had to compensate the assured's loss, cf. sub-clause 3, *second sentence*.

## Section 2

### Perils insured against, causation and loss

#### General

This Section comprises five topics of vital importance in marine insurance:

- (1) the question of the extent of the perils covered under marine insurance; i.e. whether there are perils of a general nature which must be excluded in all types of insurances;
- (2) definition of war perils and the scope of the liability of the insurers who cover marine and war perils, respectively;
- (3) the question of whether to apply the apportionment rule or the dominant-cause rule in cases of concurrent causes;
- (4) duration of the insurer's liability; the question of how to adapt the general maxim of insurance law that the insurer shall only be liable for losses which occur during the insurance period;
- (5) the principles for dividing the burden of proof between the insurer and the assured.

#### **Clause 2–8. Perils covered by an insurance against marine perils**

The Commentary was amended in 2016 to remove some history and reference to the special cover provided by the Norwegian Shipowner's Mutual War Risks Insurance Association in Chapter 15.

**Letter (b) was amended in the 2019 Version and split into two letters (b) and (c) whereas the other letters (c) and (d) were renumbered. Letter (c) – now (d) – on insolvency was also amended in the 2019 Version.**

An insurance against marine perils covers “all perils to which the interest may be exposed”, cf. *sub-clause 1, first sentence*. **There are five** positive exceptions from this point of departure, *viz.*:

- (1) perils covered by war **risks** insurance **as listed in Cl. 2-9, sub-clause 1**,
- (2) “intervention by **own State power**” **as defined in letter (b)**,
- (3) requisition by State power, cf. letter (c)**,
- (4) insolvency/**lack of liquidity and operation of ordinary legal process, cf. letter (d)**, and
- (5) perils covered by the RACE II Clause, cf. letter (e).**

In accordance with the traditional solution in marine insurance, the perils are divided into two groups. A distinction is made between perils covered by the insurers against ordinary marine perils and perils covered by the insurers against war perils. The division is formally made by means of an exclusion of perils in the insurance against marine perils, cf. Cl. 2-8 (a), and a cover of the excluded perils through a special war-risk insurance, cf. Cl. 2-9. However, in reality the marine and war-risk insurances are two equal types of insurances on the same level which - with a few minor exceptions - each cover their part of a total range of perils. The perils covered by the war-risk insurance are specified, while the

range of perils covered by the insurance against marine perils is negatively defined, covering any other form of perils to which the interest is exposed.

Because there is a negative definition of the range of marine perils, it is in reality described by reviewing the relevant exceptions. Such a review is given below, along with an overview of certain points where exceptions have been considered. However, initially it is deemed expedient to give a brief overview of the positive content of the range of marine perils, see for further details

*Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 49-54.

An insurance against marine perils covers, in the first place, perils of the sea and similar external perils. Perils of the sea mean the perils represented by the forces of nature at sea seen in conjunction with the waters where the ship is sailing. Typical examples of these perils are where the ship runs aground, collides in fog, suffers heavy-weather damage or is broken down by wind and sea and goes down. Other external perils may be earthquakes, volcanic eruptions, lightning, etc.

Secondly, an insurance against marine perils covers perils in connection with the carriage of goods or other activities in which the ship is engaged. The cargo carried by the ship may threaten its safety; similarly, passenger traffic may entail special elements of perils.

Thirdly, weaknesses in the ship and similar “internal perils” are in principle regarded as perils covered by an insurance against marine perils. However, there are a number of exceptions and modifications here; in hull insurance, Cl. 12-3 and Cl. 12-4 thus constitute a significant curtailment of cover.

Fourthly, injurious acts by third parties will basically be perils that are covered by an insurance against marine perils. These may be collisions, explosions, fire or the like, which arise outside the insured ship, etc. It is irrelevant whether or not the person causing the damage is blameworthy; damage caused intentionally will also be covered. One important type of injurious act by a third party will nevertheless be excluded from the cover against marine perils, *viz.* interventions etc. by a State power; such acts will instead to a large extent be covered by the war-risk insurance, see Cl. 2-9, sub-clause 1 (b).

Finally, errors or negligence on the part of the assured or his employees will, as a main rule, be covered by an insurance against marine perils. However, there are important limitations to this cover. Most of the rules of this type are compiled in Chapter 3.

*Sub-clause (a)* excludes from the range of perils covered by an insurance against marine perils “perils covered by an insurance against war perils under Cl. 2-9”. The perils thus excluded appear from Cl. 2-9 and the relevant part of the Commentary on that provision. It is, however, clear that whether the ship has war-risk cover in one form or the other under Cl. 2-9 will not affect the insurance against

marine perils. The insurance against marine perils will thus not be extended if the ship does not have the maximum cover against war perils under Cl. 2-9.

It has not been unusual for a ship to have hull insurance on **Plan** conditions against marine perils and on English conditions against war perils, and vice versa. Such combinations entail a risk that the person effecting the insurance may have double insurance on the one hand and gaps in the cover on the other. Also, as it appears from Cl. 2-8 and Cl. 2-9, there are admittedly certain gaps in the system of cover, but these are gaps that are normally uninsurable. Furthermore, the entire purpose of Cl. 2-8 and Cl. 2-9 has been to devise a co-ordinated system without double insurance or gaps.

It would probably be safe to say that overlapping insurances are less dangerous to the person effecting the insurance than insurances with gaps in the cover. In the event of overlapping insurances, one “merely” risks having to pay additional premiums for the overlapping factor, whereas gaps in cover may entail the risk that the assured is left wholly or partially without cover. A few examples will show the gaps in the cover that may be the result of an injudicious combination of the Plan and English conditions. It follows from Cl. 2-8 (a), cf. Cl. 2-9, sub-clause 1 (d), that piracy is regarded as a war peril and is consequently covered by insurances against war perils according to the Plan. Under English conditions piracy is - after some indecisiveness over the years - regarded as a marine peril, which means that a person with Nordic insurance against marine perils and an English insurance against war perils will not be covered against piracy. Similarly, the Plan is based on a modified “dominant-cause” rule in the event of a combination of marine perils and war perils, see Cl. 2-14, while English law in such a combination-of-perils situation would rely on a strictly “dominant-cause” criterion. If the person effecting the insurance has Nordic insurance against marine perils and English insurance against war perils, he runs the risk that English courts will say that the marine peril must be regarded as “dominant”, and that the English war-risk insurer must consequently be free from liability, while Nordic courts would perhaps reach the conclusion that both groups of perils must be deemed to have exerted equal influence on the occurrence and extent of the loss and, in keeping with Cl. 2-14, second sentence, find the Nordic insurer against marine perils liable for only 50% of the loss.

*Sub-clause (b) deals with interventions of own State power. The provision was amended in the 2019 Version partly to extend the cover for such interventions, partly to clarify contradictions in the Commentary on the marine insurer’s liability for such interventions.*

Until the 2019 Version, the exclusion in letter (b) applied to “intervention by a State power” without any further limitations. The concept of “State power” included “individuals or organisations exercising supranational authority”. The provision was closely linked to the provision in Cl. 2-9, sub-clause 1 (b,) stating that the war risks insurance covered “capture at sea, confiscation and other similar interventions by foreign State power”. An important aspect of the war risks cover was that the concept of “other similar interventions” was limited to

interventions that were undertaken for the purpose of an overriding political objective, and that interventions made as part of the enforcement of customs and police legislation were not covered. Based on this and the wording of the two provisions one should think that any intervention by State power regardless of the type and motive was excluded in Cl. 2-8 (b), whereas the more qualified interventions by foreign State power were covered by Cl. 2-9, sub-clause 1 (b). The result should then be that all interventions by national State power and less qualified interventions by foreign State power were excluded. However, the Commentary to Cl. 2-8 (b) implied that the wording was too wide by inter alia stating that “Interventions made as part of the enforcement of customs and police legislation will thus, as a main rule, be covered by the insurance against marine perils to the extent the losses are recoverable in the first place.” This comment was contrary to the wording of the Clause and created uncertainty as to the extent of the exclusion in Cl. 2-8 (b). The confusion was further strengthened by remarks in the Commentary to other relevant provisions. Under the 2019 revision, it was therefore deemed necessary to clarify the cover on this issue. In addition, there has been a trend where vessels have been captured at sea and/or detained in port by foreign State power and where it has been doubtful whether the State power enforced ordinary police or customs legislation or there was some overriding political objective involved. Examples are the detainments of the vessels *B Atlantic* in Venezuela, *Sira* in Nigeria, and *Poavosa Ace* in Algeria. Such cases often include some fraudulent or criminal behaviour by a third party, for instance by the charterer or the receiver of the goods. These situations raise questions both as to the extent of the war risks insurer’s liability according to Cl. 2-9, sub-clause 1 (b), and whether the marine insurer could be liable and if so the extent of such liability. The interpretation of Cl. 2-9, sub-clause 1 (b), was clarified in the *Sira* arbitration case by Hans Jacob Bull, which is outlined in further detail below and under Cl. 2-9, sub-clause 1 (b).

The main results of the amendments based on the *Sira* case and recent developments are that:

1. Requisition by any State is not covered either by marine risk or by war risks insurance,
2. the marine risk insurance excludes certain qualified interventions by own State power provided these have been made for the furtherance of overriding national political goals,
3. the war risks insurance does cover such interventions by foreign State power or a supranational power,
4. the marine risk insurance covers interventions by own and foreign State power and supranational powers that are not either excluded in Cl. 2-8 (b) or (c) or covered by Cl. 2-9 (b), but only to the extent that the losses concerned are of the kind covered by the relevant insurance.

Under Cl. 2-8 these amendments have made it necessary to divide letter (b) in two so that letter (b) deals with “capture at sea, confiscation, expropriation and other similar interventions by own State power provided any such intervention is made for the furtherance of an overriding national political objective”, whereas letter (c) deals with requisition.

Letter (b), first sentence, now excludes “capture at sea, confiscation, expropriation and other similar interventions by own State power”. The interventions are the same as defined in Cl. 2-9, sub-clause 1 (b). This means that as far as the description of the interventions are concerned, the two provisions are identical. However, since such interventions most often are made by a foreign State power, it is natural that further definitions and explanations in the Commentary are made under Cl. 2-9 (b) on war risks insurance.

It is important to emphasize that the exclusion in Cl. 2-8 (b) and the cover in Cl. 2-9, sub-clause 1 (b), must be seen in the context of the all risks principle in Cl. 2-8. Interventions by own or foreign State power that are not excluded in Cl. 2-8 (b) or covered by Cl. 2-9, sub-clause 1 (b), are covered by the all risks principle unless the exclusion in Cl. 2-8 (c) applies. Generally therefore, interventions by State power other than those mentioned will be covered by the marine insurer unless the intervention is either part of the “operation of ordinary legal process ...” etc. under Cl. 2-8 (d), or is excluded by other rules in the Plan, for instance Cl. 3-16 on illegal undertakings. The result is that interventions such as capture, arrest or detainment in port or the like - due to for instance suspicion or investigation of breach of regulations concerning fishery, customs, pollution, safety or navigation, will be covered. However, if the breach means that the vessel is being used for “illegal purposes” and the assured knew or should have known about this, the loss will be excluded according to Cl. 3-16. If the assured was in good faith and the breach is the result of a fraudulent or criminal act or omission from a third party, for instance the master or crew, the charterer or the receiver of the goods, cover remains in place. This widening of the cover compared to the previous wording of Cl. 2-8 (b) is a response to situations where vessels are captured and/or detained in foreign ports for a longer period of time due to some criminal behaviour by for instance a third party or the charterer or the master and crew. The amendment is also intended to bring the exclusion into alignment with the terms of Cl. 3-16 on illegal undertakings.

Further, the exclusion in Cl. 2-8 (d) only applies to “ordinary legal process”. In cases where the intervention is due to abuse of power or corruption, this is covered by the all risks principle. In some countries cases which commence as a regular administrative, police or judicial process can easily degenerate in excessive delays or attempts at extortion. If the intervention in such case turns out to be for the purpose of an overriding national political objective, the intervention will be covered by the war risks insurer according to Cl. 2-9, sub-clause 1 (b). However, there may be cases where no such national political motive can be detected, but the interventions are

clearly outside the scope of normal due process. Examples would be the Chemical Ruby and Sira arbitration cases referred in Wilhelmsen/Bull, Handbook on hull insurance, 2017, pp. 94-99, where there were excessive delays but no clear overriding political objective. Such cases will then be covered by Cl. 2-8 according to the all-risks principle. Both accidental and deliberate but unjustified damage to the vessel during the exercise of State powers of the kind that falls within this category is covered by the insurers against marine perils. This also means an extension of the cover under the insurance against marine risk compared to the previous wording of Cl. 2-8 (b). When a vessel is captured at sea and/or detained in port, it may be difficult to ascertain whether this is due to misuse of power or corruption or if the intervention has an overriding national political objective. An intervention by a foreign State power with an overriding political motive is covered by Cl. 2-9, sub clause 1 (b), and is thus outside the scope of Cl. 2-8, see letter (a). If there is doubt as to which policy applies, Cl. 2-16 on division between the two perils may be applied. The assured may also require payment on account according to Cl. 5-8.

The new provision in Cl. 2-8 (b) only regulates the peril that is insured. There are no changes in the regulation of losses that are covered by the marine insurer. The traditional difference between losses covered under a marine policy and that covered under a war risks policy is therefore upheld. The insurances regulated within the Plan framework are essentially standard products. Standard Plan marine policies do not cover loss of time/income unless it has arisen as a consequence of physical damage to the vessel or one of the other limited circumstances defined in Cl. 16-1. Delays and loss of time due to State interventions of the kind that remain covered under Cl. 2-8 will therefore not give rise to a claim under a loss of hire policy governed by the Plan Ch. 16. Similarly, a marine insurance policy for hull and machinery only covers total loss of a vessel if the assured “has been deprived of the vessel without any prospect of recovery”, ref. Cl. 11-1. This is a much higher threshold than the 6 months’ time limit that applies in the case of war risks under Ch. 15. The standard cover provided by the Plan is not intended to provide the kind of “political risk” cover that would more fully protect owners of vessels trading to countries that have a more or less dysfunctional political system. Solutions for such vessels are available in the market and it is a matter for the assured to decide what level of more specific cover they deem appropriate. It is not natural to spread this risk over all assureds that do not trade in these areas.

*Sub-clause 1 (b), second sentence*, defines the concept of “own State power” to mean the State power in the ship’s State of registration or in the State where the major ownership interests are located. The term “State of registration” is not without its ambiguities in the event of so-called double registration in connection with bareboat chartering. However, in the event of double registration in both the owner State and the bareboat-charterer State, both States must be regarded as “the State of registration” for the purpose of this provision. As regards the term

“controlling ownership interests”, the vital question will normally be in what country the largest proportion of the ownership interests are located. However, the term opens the door to a discretionary assessment, where other elements such as limitations on voting rights, the composition of the ownership interests, co-operation arrangements etc. may lead to the conclusion that the controlling ownership interests are located in another country.

According to *sub-clause 1 (b), third sentence*, the concept of “own State power “ does not include individuals or organisations exercising supranational authority. This conforms to the previous definition of own State power. Supranational authority is included in the concept of foreign State power in Cl. 2-9, sub-clause 1 (b). This means that interventions by such power will be covered by war risks insurance within the framework of this provision. Interventions outside this cover will be covered under the all risks principle in Cl. 2-8 except for requisition, which are excluded in Cl. 2-8 letter (c), cf. below.

Since the exclusion for intervention of State power has been limited by the revised wording of Cl. 2-8 (b), it is no longer necessary to have specific wording to achieve the purpose of the so called “pollution hazard clause” that was incorporated as an exception to the exclusion in the previous wording of Cl. 2-8 (b). It is now clear that subject to the exception in Cl. 2-9, sub-clause 1 (e), any measure taken by a State, own or foreign, for the purpose of averting or limiting any loss or damage whether pollution or any other kind of loss or damage will not be excluded by Cl. 2-8 (b), but will remain covered under an insurance against marine risks by virtue of the all risks principle. The exception in Cl. 2-9, sub-clause 1 (e), is the case of any measure taken by a foreign State power to avert or limit loss or damage where the cause of the original casualty or threat of a casualty is a war peril as defined in Cl. 2-9, sub-clause 1 (a)–(d). In this case it is of course the war risks insurer who is liable for any loss or damage that might arise as a consequence of the measures to prevent loss.

*Sub-clause 1 (c)* excludes “ requisition by State power”. In the previous 2016 Version, this exclusion would follow from the broad exclusion for “intervention by State power” in (b). With the more narrow provision in the new letter (b), it is necessary to make a separate clause for requisition to emphasize that requisition by State power is excluded regardless of the motive for the requisition. An identical exclusion is made in Cl. 2-9, sub-clause 2 (c). This exclusion was previously placed in Cl. 2-9, sub-clause 1 (b), but it was expressly stated that it applied to requisition “for ownership or use”. The expression “for ownership or use” is deleted both in Cl. 2-8 (c) and Cl. 2-9, sub-clause 2 (c) to simplify the wording, but no material change is intended. Requisition is excluded regardless of whether a State takes over the ownership functions of the vessel or the measure is limited to the use of the vessel. Further, the exclusion for requisition applies to both own and foreign State power even if requisition typically is done by own State power, cf. below. The concept of requisition was not defined in the previous 2016

version of the Commentary, but it was stated that “Requisition as an intervention typically occurs in times of war or in times of war-like conditions, or during a political crisis. A general criterion for defining requisition as a war peril is therefore that the intervention is politically motivated. If the State expropriates the ship for other reasons, for instance pursuant to quarantine provisions to prevent the spread of a virus, this does not constitute “requisition” in accordance with this provision.” This implied that requisition was the same as politically motivated expropriation, but it was not clear how expropriation as an intervention was to be treated. Further, the reason to exclude requisition was that “According to ordinary principles of expropriation law, the requisitioner must pay full compensation for the subject-matter requisitioned or - in the case of requisition for use - cover liability and any damage and reduction in value which the subject-matter of the requisition has suffered during the period of requisition.” This may be true for requisition and also for expropriation by own State power, but it is not always true for expropriation by foreign State power. The Committee means that requisition and expropriation today are not identical concepts, and that expropriation should be treated similar to confiscation, i.e. excluded in Cl. 2-8 (b) and covered in Cl. 2-9 (b). The concept of expropriation is therefore defined under Cl. 2-9, sub-clause 1 (b).

There is no court decision that provides a definition of the concept of requisition, and the concept is not clear either in Nordic or in English marine insurance. “Requisition” in the Plan means that the State “requisite” the vessel for ownership or use according to legislation and in national interest. The relevant legislation will normally provide a formal procedure to be followed. Requisition is typically limited in time and the purpose is that the vessel shall be redelivered to the owner after a certain period. Normally, but not necessarily, the authority to requisite vessels will be limited to vessels under the State’s own flag. The rule is also that the State compensate for the use of the vessel and pay for any damages during the period of use, but this is not a requirement for the exclusion to apply. Expropriation, on the other hand, means that the owner is permanently deprived of the ownership to the vessel. This is thus a different concept from requisition, although the concepts may overlap if the period of requisition is uncertain and/or compensation is paid for the expropriation.

The exclusion for requisition in the sense described above is upheld. If the vessel is registered in one of the Nordic countries it must be expected that the State will pay compensation if they take over the vessel for ownership or use regardless of the motive for the requisition, and it is not natural to cover this under the insurance. Requisition of the vessel for instance to use it as a hospital vessel will according to this exclusion not be covered. An identical provision is found in Cl. 2-9, sub-clause 2, letter (c).

*Sub-clause (d)* was revised in 2019 and the Commentary was re-written. The exclusion now applies to “insolvency or lack of liquidity of the assured or the operation of ordinary legal

process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance”, whereas the previous exclusion was for insolvency only. The term “insolvency” has been used in the English text of the Plan as a translation of the Norwegian term “manglende betalingssevne” literally “lacking the ability to pay”. Consequently, insolvency in Cl. 2-8 and Cl. 2-9 means inability to pay regardless of the cause of the insolvency or whether it is temporary or permanent. There is no requirement for the insolvency exception to apply that the economic situation for the assured is so grave that the assured has been or may be declared bankrupt, enters into composition agreement with his creditors or seeks protection from creditors, under any applicable legislation such as e.g. Chapter 11 proceedings under U.S. law. In order to avoid any doubt, the phrase “or lack of liquidity” has been added so as to better reflect the original Norwegian text. The term does not apply to cases where a person has the ability to pay but refuses to do so, perhaps because the claim is disputed or for some other reason. Of course, it is possible that a refusal by the assured to pay a third party demand might affect the amount or indeed the validity of an insurance claim, but this would be for reasons unrelated to a lack of liquidity or insolvency.

It can be argued that even without any specific exclusion the assured would be unable to claim for losses that can be attributable to his own insolvency or lack of funds. Lack of funds is no excuse for a failure to perform one’s contractual obligations such as the duty to maintain the vessel in a proper condition. The same applies under a loss of hire insurance policy if repairs are delayed by the assured’s inability to pay for the necessary spare parts. It is even doubtful whether a repossession of the vessel by a mortgagee for non-payment of a loan could ever be claimed even under an all risks policy, but sub-clause (d) removes any possible doubt on this point.

It may at times be difficult to decide whether there is legally relevant causation between the insolvency and the casualty. If the ship is arrested as security for the shipowner’s debt and subsequently becomes involved in a collision or sustains damage during a storm, one might say that it would have avoided the collision or the heavy weather if it had not been delayed due to the arrest. Yet there is no relevant causation between the arrest and the damage; the insolvency has merely been an external and completely accidental cause of the damage. The situation will be different, however, if the arrest in itself increases the risk that the ship may suffer a casualty. Thus, if the ship is arrested in late autumn in a port which will normally freeze over within a short period of time, and the ship sustains ice damage during departure, there may, in view of the circumstances, be a relevant causation between the arrest and the damage. In that event, the arrest might also be regarded as the only cause of the damage, and the rule relating to causation contained in Cl. 2-13 would not be applied.

Previously the exclusion for insolvency also applied to the insolvency of any party other than the assured. It is difficult to see the need for such an exclusion although there are cases where a

specific exclusion avoids the need to use more complex reasoning from basic principles of contract law. On the other hand, it is obvious that there are cases where a simple exclusion for insolvency of a third party is inappropriate. Clearly, insurers must carry the risk of third party insolvency when exercising rights of subrogation against third parties who are responsible for damage that is covered by an insurance. If the owner of a vessel that has collided with the insured ship or a bunker supplier who has supplied off-spec bunkers is bankrupt, that is the insurers' problem and not the assured's. The revised wording of sub-clause (d) discussed below replaces the very unclear exclusion for insolvency of persons other than the assured with more specific wording that makes it clear without further discussion that certain obvious limitations in the scope of the insurance apply.

The scope of the exclusion for intervention by State power in Cl. 2-8 was restricted in 2019, ref. the Commentary to Cl. 2-8 (b). As a consequence the words “or the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to any claim or liability covered by the insurance” were added in (d). Since cover under Cl. 2-8 is based on the all risks principle, losses of the kind covered by any Plan insurance arising from interventions by State powers or even the ordinary exercise of a State's judicial or administrative powers will be covered unless they are excluded. After the changes to Cl. 2-8 (b) and Cl. 2-9, sub-clause 1 (b), the situation is that interventions by a foreign State power that satisfy the criteria in Cl. 2-9, sub-clause 1 (b), are covered by an insurance against war perils and therefore excluded from cover under Cl. 2-8 (a), while interventions by the vessel's flag state or the State where the major ownership interests are located are now specifically excluded by Cl. 2-8 (b). This would mean that interventions that does not have an overriding political goal will be covered by the all risks principle, hereunder interventions based on ordinary legal process. It is unlikely that the operation of ordinary legal processes will be the direct cause of physical damage to a vessel or lead to the owner being deprived of the vessel without any prospect of recovery but the possibility cannot be entirely discounted. In addition, it is not natural for any form of insurance to cover the cost of delays or legal costs of ordinary legal process to enforce the payment of debts or other legal rights against the assured or the vessel that are unrelated to a valid claim. It is true that the basis for legal proceedings involving the vessel might be unreasonable or ill founded. However, there is a well-established set of rules in most jurisdictions concerning arrest of vessels and protection against wrongful arrest. In many cases the vessel's P&I club will provide security to lift the arrest and so called Defence cover will cover the costs of negotiating and providing security in other cases. Where the legal proceedings relate to a valid insurance claim such as a demand for security for salvage services or in connection with a collision, the appropriate insurer will provide security and cover any costs involved. The exclusion will therefore only be relevant in very exceptional cases. It is true that the new exclusion like the exclusion for “insolvency” can apply irrespective of whether the legal proceedings relate to a claim against the assured or a third party such as a charterer but for the

**reasons explained above the new wording is much less likely to lead to confusion or unintended consequences. It should be noted that the exclusion only applies to legal proceedings to enforce a debt or obtain security for a debt. It does not apply to e.g. proceedings related to public law matters such as the enforcement of customs or trading regulations. Such cases are governed by the rules in Cl. 3-16.**

*Sub-clause (e)* was introduced in 2007 as a result of the attitude of the reinsurance market as regards terrorism risk after the terrorist attack in New York on 11 September 2001. At that time the reinsurance market included the following Clause in all reinsurance contracts (RACE II):

### **INSTITUTE EXTENDED RADIOACTIVE CONTAMINATION EXCLUSION CLAUSE**

This clause shall be paramount and shall override anything contained in this insurance inconsistent herewith.

1. In no case shall this insurance cover loss damage liability or expense directly or indirectly caused by or contributed to by or arising from
  - 1.1. ionising radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel,
  - 1.2. the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof,
  - 1.3. any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter
  - 1.4. the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter. The exclusion in this sub-clause does not extend to radioactive isotopes, other than nuclear fuel, when such isotopes are being prepared, carried, stored, or used for commercial, agricultural, medical, scientific or other similar peaceful purposes.
  - 1.5 any chemical, biological, bio-chemical, or electromagnetic weapon.

The term “release of nuclear energy” will also include radioactive radiation (released from an unstable atom). In a broad sense, the term also includes the toxicity and contamination of substances that are formed during and after such a “release”.

Sub-clause (e) (4), *last part*, states that the exclusion also applies to radioactive isotopes from nuclear fuel, when such isotopes are being prepared, carried, stored, or used for peaceful purposes. This provision corresponds to no. 1.4, last sentence, of the English Clause. Since the reinsurance market accepts this type of nuclear risk in peaceful activities, there is no reason not to include it in the Plan's cover against marine perils.

Sub-clause (e) (5) was also taken from the RACE II Clause, which includes "biological, chemical, biochemical and electromagnetic weapons". According to the English insurance market, the purpose of the wording "biological, chemical, biochemical" is to exclude nerve agents and viruses such as "sarin", mustard gas, smallpox, etc. The formulation does not include explosives, or methods for detonating or attaching explosives. Nor does it cover use of the ship or its cargo for harmful purposes, unless the cargo itself constitutes a chemical or biological weapon that is covered by the Clause. The term "electromagnetic weapon" refers to sophisticated mechanisms designed to destroy computer software, and not to methods for detonating or attaching explosives.

After 11 September 2001, the reinsurance market also introduced an exclusion for the use of computer technology for harmful purposes, the Cyber Attack Clause (CL 380). No such exclusion has been incorporated in the Plan because it is possible at present to reinsure this risk, and many insurers choose to do so. Insurers who do not have such reinsurance must therefore include this exclusion clause in their individual insurance contracts.

The wordings with regard to causation in the first sub-clause of the English clause have been maintained by means of amendments to sub-clause 2 of Cl. 2-13. The wordings as regard burden of proof have been incorporated in Cl. 2-12.

One type of limitation of liability which must obviously be contained in every insurance is the one relating to negligence on the part of the person effecting the insurance or the assured. However, the crucial point here is that the assured's co-contractor, or someone else who derives a right from the insurance contract has breached its terms in a subjectively blameworthy way. The majority of the rules of this type are compiled in Chapter 3.

There are also a number of other perils which insurers will normally not undertake to cover:

(1) Basically a marine insurance does not cover *recessions*, i.e. a general decline in the market value of the interest insured. The assured cannot claim compensation merely on the grounds that due to the price trend, the object insured is not worth as much as he assumed it would be at the time the insurance was taken out. This already follows from the fact that the insurer's liability cannot be triggered without the occurrence of a casualty, i.e. an event which triggers liability under the conditions applicable in the relevant branch of insurance.

However, no general rule can be established to the effect that the assured will never be entitled to compensation for a loss resulting from a recession. The fact is that in many cases when an assured suffers a casualty the particular insurance conditions will provide him with compensation for a recession loss which he would otherwise have suffered. A clear example is the rule in Cl. 2-2 to the effect that the insurable value is the value of the interest at the inception of the insurance. If ships' prices have fallen during the insurance period, the shipowner will, in the event of a total loss, obtain compensation for a value which he could not have obtained by selling the ship. In this light it would not be expedient to have a separate formal exclusion of perils in the event of a recession.

(2) Certain English conditions contain explicit exceptions for "loss through delay". However, it is not possible to establish such a general exception without getting into difficulties every time a delay has been the external cause of a recoverable loss.

Another matter is that the insurer does not, without an explicit agreement, cover "loss of time", i.e. a loss exclusively connected with the delay and increasing proportionally with that delay. Thus, as a general rule, the hull insurer will not be liable for the shipowner's general operating costs relating to the ship during repairs. This rule is worded as an exception in Cl. 4-2. However, it should be noted that in certain cases the hull insurance does provide partial cover of loss of time; moreover, separate insurances are often taken out against loss of time (see Chapter 16).

(3) As a general limitation of the range of perils, it is sometimes stipulated that the insurer does not cover losses *caused by the assured having entered into a contract with unusual conditions*. As a rule, the loss will consist in the assured having undertaken to pay damages to a third party to a greater extent than he might have been held liable to pay under general rules of law or under common conditions in the trade in question. Such liability clauses may be found, for example, in contracts for towage or carriage of goods. The "unusual conditions" may also make it easier for a third party to cancel the contract (termination of a contract of affreightment by reason of force majeure) or to invoke an exceptionally high remuneration or other contractual advantages (e.g., in a contract for the repair of a ship). The loss may also consist of the assured renouncing a right of recourse which he would otherwise have had against a third party.

Questions of this nature should preferably be subject to special regulation in each individual area where contractual clauses may affect the insurer's liability. Such limitations of liability are incorporated in Cl. 4-15 (liability clauses) and in Cl. 5-14 (clauses relating to the waiver of rights to claim damages from a third party). With respect to contracts for the repairs of casualty damage to the ship, the hull insurer will be involved to such a great degree through the rules relating to surveys, invitations to submit tenders, approvals of invoices, etc., that he will thereby be able to exercise the necessary control.

(4) The insurer will normally limit his liability if the interest insured is used to further an *illegal undertaking*. A similar limitation is implicit in the requirement that it must be a “lawful interest”; as mentioned above in Cl. 2-1, however, it is difficult to specify exactly what this means.

In the Plan, illegal undertakings are regulated in Cl. 3-16. Sub-clause 1 provides that the insurer is not liable for loss resulting from an illegal use of the ship of which the assured was aware and which he could have prevented. This limitation of liability is very moderate, requiring both causality and subjective blameworthiness of the assured himself or anyone with whom he might be identified (cf. below in Chapter 3, Section 6). However, this rule is supplemented by sub-clause 3 which provides that the entire insurance terminates if the ship, with the consent of the assured, is essentially used for the furtherance of illegal purposes.

(5) The purpose of insurance is to provide protection against unforeseen losses. *The foreseeable loss* in the form of maintenance, regular operating expenses, etc. must be covered by the assured himself. The dividing line between which losses are “foreseeable” and which are “unforeseeable” is far from clear and may cause doubt in all branches of marine insurance. This question can hardly be solved by an explicit provision in the general part of the Plan, however.

The conditions of the various types of insurances contain a number of provisions which shed light on the dividing line between ordinary expenses and losses which are covered by the insurance. From hull insurance Cl. 10-3 and Cl. 12-3 should in particular be mentioned. The provision in Cl. 10-3 excludes “loss which is a normal consequence of the use of the ship, its tackle and apparel”. Cl. 12-3 addresses damage due to wear and tear and similar causes. Costs of repairing a part which is worn or corroded are never paid by the insurer, but wear and tear is not an excluded peril. Casualties caused by wear and tear are therefore in the same category as other casualties. In other contexts as well, the provision goes far in imposing liability on the insurer for costs which, under the conditions in effect in other countries, would be regarded as operating expenses for the shipowner’s account. This will be discussed in further detail in Chapters 10 and 12.

### **Clause 2–9. Perils covered by an insurance against war perils**

The Commentary was amended in 2016 to remove some history and references to the special cover provided by the Norwegian Shipowner’s Mutual War Risks Insurance Association in Chapter 15. **In addition, the Commentary was substantially amended in the 2019 Version in connection with the amendments to Cl. 2-8 (b), (c) and (d) and Cl. 2-9, sub-clause 1, letter (b) and sub-clause 2, letters (a) and (c).**

As mentioned in Cl. 2-8, the total range of perils in marine insurance is divided into two. Separate insurances must be taken out against perils related to war and against general marine perils. In practice the terms “war perils” and “marine perils”, “war-risk insurance” and “marine-risk insurance” are used. The Plan has adopted this terminology and therefore uses the term “marine perils” to cover the “civilian” perils which occur in the shipping trade.

The Plan maintains the traditional division of the range of perils into war-risk insurance and marine-risk insurance. Due to the fact that the exception for war perils in marine-risk insurance relates to the range of perils in war risk insurance (cf. Cl. 2-8 (a)), no gaps in cover will occur other than those that follow from explicit provisions.

Technically, war perils constitute an exception in general marine insurance. The insurer against marine perils is liable for “all perils to which the interest insured is exposed”, with the exception of *inter alia* war perils. In war-risk insurance, on the other hand, the range of perils is positively determined, and will (as a rule) comprise most of the perils excluded by the war-risk exception. However, this wording does not entail that general principles of insurance law, such as the principle that excluded perils should be subject to strict interpretation and that the insurer has the burden of proving that the loss is caused by a peril which is explicitly excluded from the cover, cf. Cl. 2-12, sub-clause 2, shall apply. War-risk and marine-risk insurances shall in every respect be regarded as equal types of insurances on the same level. The excluded war peril shall not be subject to a strict interpretation to the disadvantage of the marine-risk insurers and, from an evidential point of view, there is no difference.

*Sub-clause 1* of Cl. 2-9 states the range of perils in war-risk insurance in (a) - (e).

*Sub-clause 1 (a)* states the “classic” war peril. The crucial element is obviously the perils caused by a war in progress. To give an exhaustive enumeration of the events which may be relevant here is not possible. Primarily there is the use of implements of war by the powers at war (or neutral powers) - bombs, torpedoes and other conventional firearms, chemical or biological implements of war, and the like. If the damage is directly attributable to the use of such an implement of war for the purpose of war, the loss is subject to the special causation rule contained in Cl. 2-13, cf. below. But also otherwise, the use of implements of war may be the cause of a loss such as when the ship has to pass through dangerous waters in order to avoid a mine field or, in order to stay away from an area where a sea battle or an air raid is taking place, and in the process runs aground.

An implement of war may be the cause of damage also after the war in which the implement was used has ceased, e.g. where a ship runs into a mine. Such damage shall also be regarded as “a peril attributable to war”, regardless of whether or not the mine explodes. If the impact does not result in an explosion it may, however, be difficult to prove whether the impact is attributable to the implement of

war or a common marine peril, e.g. a log. In that event the rule of apportionment in Cl. 2-16 may have to be applied.

Generally, all such measures that are regularly taken by powers at war as well as by neutral powers and which affect shipping, such as the extinguishing of lighthouses, the withdrawal of old navigation marks and the putting out of new ones, the organising of convoys where the freedom to manoeuvre is more or less restricted, orders to sail without navigation lights, etc., will constitute war perils, due to the fact that they are attributable to the war, cf. the wording of the Plan.

As for capture at sea, requisition and the like undertaken for the purpose of war, and sabotage carried out to further the purpose of a power at war, these are perils directly attributable to the war and therefore come under the definition in Cl. 2-9 sub-clause 1 (a). However, these perils are also covered by the special enumeration in sub-clause 1 (b); between (a) and (b) there will thus be an overlapping as far as war-motivated measures are concerned. However, if the measure is taken by the ship's own (not "foreign") State power, the special rule contained in sub-clause 1 (b) must prevail. Such measures will therefore fall outside the cover, regardless of whether or not they are war-motivated. If, in exceptional cases, the war-risk insurer has not accepted liability for the perils mentioned in sub-clause 1 (b) and (c), it will be a matter of construction to decide whether he must nevertheless be liable under sub-clause 1 (a) for war-motivated measures by a foreign State power and war-motivated sabotage.

The term "war-like conditions" is used to imply that the decisive point is not whether war has broken out or threatens to break out, but how war-like the measures are which a State has instituted. Whether there are "war-like conditions" may, of course, be difficult to decide, but in practice the term will hardly be of any great significance. As a rule, the loss will have been caused either by military manoeuvres or by measures taken by State power, and in either case it will be covered by the war-risk insurer, even if there are no "war-like conditions". If a ship which is in international waters or within the territorial borders of a foreign State, becomes the subject of a simulated or real air raid by the relevant foreign State, this must normally be regarded as a war peril. Exceptions are nevertheless conceivable where the action must be viewed as part of the enforcement of the relevant State's police or customs legislation, see below under sub-clause 1 (b).

A "civil war" will normally constitute a "war-like condition", and the addition is therefore more in the nature of a specification than an amendment. An example of losses that are covered under this alternative is where aircraft from rebel forces in a civil war drop bombs that hit neutral ships, cf. the situation during the Spanish civil war, when bombs dropped in the summer of 1936 struck the Norwegian ship D/S Frank.

The war-risk insurer is also liable for "the use of arms or other implements of war in the course of military manoeuvres in peacetime or in guarding against infringements of neutrality". The main

problem here will be to decide when there is a case of “use of...other implements of war”. If a ship collides with a naval vessel sailing in an ordinary manner, this will not constitute any use of implements of war. The same applies if, for example, a military plane crashes in a harbour due to engine trouble, or an ammunition depot blows up as a result of an ordinary “civilian” fire. The “use of implements of war” presupposes that the naval vessel (the aircraft, the ammunition) is used in a manner typical of its function as an implement of war, e.g., that during exercises the naval vessel disregards the rules relating to navigation at sea, that the aircraft crashes during dive-bombing exercises, or the ammunition stores blow up as a result of a failure to comply with the relevant safety regulations.

An important question is how to evaluate the mistakes which the crew makes under the influence of the war situation. A war will normally make navigation conditions much more difficult than in times of peace. More concentration and alertness are required of the crew (e.g., while sailing in waters where lighthouses and navigation marks are out of operation), and an insignificant and excusable misjudgement may easily have disastrous consequences. In addition, the physical and mental pressure involved in wartime sailing may easily cause exceptional fatigue or other indisposition among officers and crew.

In the extensive case law during and after World War II it was regarded as clear that any faults or negligence committed by the master or crew relating strictly to their service as seamen should be regarded as an independent peril which fell within the marine-risk insurer’s area of liability. In this respect international tradition was followed. This approach was maintained in the 1996 Plan. Faults or negligence committed by the master or crew shall therefore be regarded as an independent causal factor, a peril which falls within the marine-risk insurer’s area of liability. As the chances of faults and negligence being committed will, as a rule, be far greater in times of war than in times of peace because navigation is that much more difficult, this in actual fact means that also the marine-risk insurer must accept a general increase in risk owing to the war situation.

However, it is conceivable that faults or negligence on the part of the master or crew must be covered by the war-risk insurer, viz. where such fault or negligence is very closely bound up with the war peril or consists in a misjudgement of this peril. It is, for example, conceivable that the officers are exhausted after having been subjected to the pressure of war for a long period of time and, as a result thereof, make a clear navigational error, or that the crew leaves the ship under the misapprehension that there is an impending risk of war (cf. the “SOLGLIMIT CASE”, Rt. 1921. 424). In practice, it is also conceivable that the reasons given for the judgment will be that the crew’s conduct in the given circumstances must be regarded as excusable; in other words, that no actual “fault or negligence” has been committed.

Moreover, when applying Cl. 2-9 sub-clause 1 (a), guidance will be found in the abundant case law relating to those ships that sailed in Norwegian and other German-controlled waters during World War II.

*Sub-clause 1 (b)* of Cl. 2-9 deals with **certain interventions by foreign States**. The provision was amended in the 2019 Version and the commentaries to this provision rewritten. The amendment is closely tied to the amendment of Cl. 2-8 in relation to interventions by own State power. Similar to the revision of Cl. 2-8 (b), Cl. 2-9, sub-clause 1 (b), is divided so that requisition is addressed in a separate sub-clause, cf. sub-clause 2 (c) and below.

The purpose of the amendment is to clarify the distinction between the marine risk insurance and the war risks insurance for such interventions, to clarify several of the concepts used in letter (b), and also to adjust the war risks cover to the criteria established in the *Sira* case. The main amendment is to emphasize that the war risks cover only includes the interventions that are listed “provided any such intervention is made for the furtherance of an overriding national and supranational political objective”. In the previous Plan version, this was not stated in the provision, but it was emphasized in the Commentary that a political motive was necessary for “other similar measures” to be covered. It was however uncertain whether such motive was required for capture at sea and confiscation. This is now clarified by the new wording. At the same time, the wording of Cl. 2-8 (b) has been revised to make it clear that such interventions by a foreign State will be covered by the marine insurance if they are not covered under the war risks insurance. This means that losses arising from measures taken by the police authorities must be covered by the ordinary marine-risk insurance to the extent that the losses are of the kind that are recoverable under the insurance in question, cf. the comments above on Cl. 2-8 (b). The loss will often consist of loss of time or general capital loss, for which the insurer is not liable. However, assuming, for example, that the vessel sustains damage during an extensive customs examination, the hull insurers against marine perils must cover the damage, subject only to the normal exclusions such as e.g. Cl. 3-16.

The interventions mentioned in Cl. 2-9, sub-clause 1 (b), may constitute a strict war measure related to a war in progress or an impending war which as a starting point would also be covered under letter (a) above. However, as a special provision, sub-clause 1 (b) will prevail.

The provision provides cover for “capture at sea, confiscation, expropriation and other similar interventions “. The cover for “expropriation” is new, cf. further above under Cl 2-8 (c).

The term “capture at sea” means that the vessel is intercepted, seized or arrested by a foreign State power at sea. This covers the situation where the insured vessel is stopped at sea by a war ship or military ship using power or threatening to do so. It is not capture “at sea” if the vessel is

arrested and detained in port without a foregoing capture. On the other hand, when the vessel is captured at sea, it will normally be escorted by power into port for further control. As long as the detainment in port is due to the same cause as the capture, the stay in port must be regarded as part of the capture. If the vessel sails into port without any threats from the foreign State, this is outside the concept of “capture at sea”. This is true even if the State could have forced the vessel to enter the port.

The term “confiscation” means that the vessel is appropriated by State power without compensation. The term comprises “condemnation in prize”, where a warring power will invoke international or domestic condemnation in prize rules.

The term “expropriation” means that the State takes over the vessel for a purpose deemed to be in the public interest. Expropriation is similar to confiscation in that the owner permanently loses ownership to the vessel. Contrary to confiscation, however, the assured may be compensated for his loss. Any such compensation must be deducted from the liability of the insurer. However, if such compensation is not paid, or the compensation is less than the assessed insurable value of the vessel, there is a clear need for cover. It should be noted that expropriation refers to a permanent loss of ownership. In case of a time limited transfer of ownership, this will normally constitute “requisition”, which is excluded, cf. sub-clause 2 (c).

The term “other similar interventions” indicates that the enumeration in sub-clause 1 (b) is not exhaustive, and that other types of interventions by a State power may be included. The term “similar” means that the intervention must have similar consequences for the assured as “capture at sea”, “confiscation” and “expropriation”. Typical for these interventions is that the shipowner is being divested of the right to dispose of the vessel. This is therefore a necessary condition for an intervention to be covered under this group. An intervention satisfying these criteria can of course take place while the vessel is in port. Requisition by State power is however excluded from cover in Cl. 2-9, sub-clause 2 (c). For further comments on the distinction between requisition and expropriation, see the comments to Cl. 2-8 (c).

A common requirement for all four groups of interventions is that they must be carried out for the furtherance of an overriding national or supranational political objective. It is therefore clear that interventions in accordance with applicable law for the purpose of enforcing customs-, police-, safety- or navigation-regulations or any private law rights against the insured vessel are outside the scope of the war risks insurance cover. If the vessel is arrested/captured at sea by the Coast Guard or representations of the police or customs authorities to hinder or investigate illegal fishery, import or export or breach of trade regulations, this will not be covered. The same is true if the vessel is arrested or detained in port because of doubt as to whether the vessel is compliant with the rules regarding technical and operational safety, or because the crew is

suspected of smuggling. Obviously, losses arising from the vessel being detained or seized as part of debt-recovery proceedings against the owners are not covered, either; this follows in any event from the exclusion in sub-clause 2 (a).

It does not matter whether such police or customs intervention is caused by illegal acts performed by a third party, for instance the charterer or the master or crew. Further, it is not decisive whether the State intervention is based on the legislation of the country or may be seen as abuse of power or corruption, if the intervention does not have an overriding national or supranational political objective. However, if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or if the intervention has the character of abuse of power or corruption.

The expression “overriding national ... political objective” is based on four arbitration cases in regard to the war risks cover for interventions by foreign State power in the 1964-Plan and the 2013 Plan Version 2016, namely unpublished award of 11 June 1985 relating to the *Germa Lionel*, ND 1988.275 NV *Chemical Ruby*, *The Wildrake* case, which was settled, and the unpublished award “*MT Sira*” of 27 October 2016, but the word “national” is added to emphasize that a public State is involved. The cases are discussed in detail in *Wilhelmsen/Bull, Handbook on hull insurance*, Oslo 2017 pp. 94-99. The three first cases are summarized in the *Sira*-case, which states that interventions for the “furtherance of overriding political goals” are interventions that are typical for war or times of international crisis, and often can be explained by foreign policy considerations. The justification for the intervention may be a warranted or unwarranted suspicion that the vessel has breached rules for the protection of the security of the State. It is not decisive that the general political situation in the State has contributed to the intervention. It follows from this that abuse of power is neither a necessary nor a sufficient condition for war risks cover. If an overriding national political goal is detected, there is no need to establish misuse of power. On the other hand, misuse of power need not be explained by such overriding political motives. Misuse of power may be a reflection of a dysfunctional State and indicate another motive, but misuse of power is not in itself a necessary condition for cover.

Overriding national political objectives will typically be outlined by the president, the parliament, the government at large, or a particular ministry. Authorities at a lower level will not have the power or authority to make this type of political evaluation, as their mandate will be limited to exercising given authority in a specific and limited area.

The term “supranational” is added to emphasize that the concept of “foreign State power” includes both public and supranational power, cf. below.

According to letter (b) *second sentence*, the term “foreign State power” means “any State power other than own State power as defined in Cl. 2-8 (b), second sentence, as well as organisations and individuals exercising supranational authority or who unlawfully purport to exercise public or supranational authority. The term therefore comprises all persons or organizations exercising public or supranational authority, except for own State power. Hence, if an intervention is implemented by representatives of a league of States (alliance, group, block), it must be regarded as an intervention by a **foreign State power**. A **confiscation or expropriation** by NATO or a similar organization will accordingly be covered by **letter (b)**. **However, requisition by NATO is not covered, see sub-clause 2 (c) and below.**

*On the other hand*, not only ordinary State powers are brought in under this term, but also all persons and organisations which unlawfully pass themselves off as being authorised to exercise public or supranational authority. In the case of interventions by groups of rebels **or** insurgents it may at times be doubtful whether the situation is covered by the wording or whether it is a case of pure piracy. However, in practice this will normally not create difficulties, as Cl. 2-9, sub-clause 1 (d) also refers piracy to the war-risk insurer’s scope of cover.

Sub-clause 1 (b) deals only with restrictions on the owner’s rights in the object insured. Actions leading to an infliction of physical damage fall within the scope of general war perils set forth in sub-clause 1 (a); there is accordingly no limitation applicable to actions by authorities of the State of registration or the State of ownership. If the object is destroyed by entities from these States during acts of war, the insurance against war perils will have to indemnify the loss. This must apply both where the destruction is an unintentional consequence of the acts of war, and where it is a result of military orders for the furtherance of military objectives of the State of registration or the State where the controlling ownership interests are located. In this connection, it makes no difference whether the military authorities have themselves effected the destruction, have ordered it, or have even used a formal requisition. In all of those cases, the assured’s loss will be recoverable. Only interventions aimed at divesting the assured temporarily or definitively of his use of the object are irrecoverable. However, what the authorities are going to use the ship for is irrelevant.

*Sub-clause 2 (c)*, excludes “requisition by State power”. Requisition was previously regulated in sub-clause 1 (b), last sentence, which stated that such requisition was not regarded as an intervention in relation to Cl. 2-9, sub-clause 1 (b). However, this expression was problematic in relation to Cl. 2-8 (b), which excluded interventions from State power because it could be argued that requisition was not included in this exclusion. This was obviously not the meaning, and the wording is changed to make it clear that requisition is not covered. To further clarify this rule, it is moved from sub-clause 1 (b) to sub-clause 2 (c). As mentioned, a similar division is made in Cl. 2-8 (b) and (c). The concept of requisition is further defined under Cl. 2-8 (c). It follows from these rules that requisition is not covered by any insurance. As mentioned above under Cl. 2-8

**(c), it must be expected that a Nordic State will pay compensation if it requisites the vessel for temporary ownership or use. There is no guarantee that a foreign State power will adhere to these principles, but there is limited availability of reinsurance for this kind of purely political risk.**

*Sub-clause 1 (c)* covers riots, sabotage, acts of terrorism and other social, religious or politically motivated use of violence or threat of the use of violence, strikes or lockouts.

By “riots” is meant violence in the form of unlawful actual harm to people or property, caused openly and by a large number of people. The distinction between riots and regular criminal acts, for which the marine-risk insurer is liable, must first and foremost be drawn on the basis of whether the background for the riots is political, social or similar circumstances.

By “sabotage” is primarily meant wilful destruction which does not form part of the conduct of war, but which is connected with, for example, labour conflicts. War sabotage is a war peril which will also be covered under sub-clause 1 (a). The sabotage need not be aimed at the actual object insured. A “go slow” action among dock workers or seamen is aimed at the employers’ interests in general, but if the action involves recoverable damage to the assured’s property, the war-risk insurer will be liable for the damage under sub-clause 1 (c). Destruction carried out by a ship’s crew as an act of vengeance or a protest demonstration against the owner must be regarded as vandalism of property and is covered by the insurance against marine perils. The same applies to wanton destruction of property carried out by someone of unsound mind or under the influence of alcohol. The term “sabotage” presupposes that the action pursues a specific political, social or similar goal, see ND 1990.140 NV PETER WESSEL, where the court based its decision on the assumption that the costs of interrupting the ship’s voyage etc. in connection with a bomb threat must be covered by the hull insurer against marine perils as costs of measures to avert or minimise the loss. The external circumstances of the threat clearly indicated that this was an act that had no background in political, social or similar circumstances.

The term “acts of terrorism” refers to the situation in which one or more representatives of a resistance group or the like carry out or threaten to carry out acts that are intended to exert influence on a government or another political body or to frighten all or parts of the population in a country.

The purpose is to promote a political, religious or ideological cause. The act of terrorism may directly affect an opponent’s persons and/or interests, such as when bombs are placed in vehicles or on board ships, when aircraft are set on fire, when oil pipelines are cut, etc. However, there is nothing to prevent nor, moreover, is it uncommon for a terrorist act to be directed against a third party; in such case the purpose is usually to draw attention to the cause for which the terrorists are fighting.

Acts of terrorism are often characterised by the fact that they endanger the lives of many people, or cause extensive material damage. We have seen a number of examples of terrorist groups in recent years. An example is the terrorist attack against the United States of America on 11 September 2001.

As is the case for sabotage, acts of terrorism will under certain circumstances fall within the scope of the term "war or war-like conditions". This will primarily be the case when acts of terrorism occur in connection with a war between several States. One example may be acts committed by resistance groups in an occupied country with a view to hurting or weakening the enemy, for instance through acts of terrorism against ordinary merchant ships. "War-related terrorism" will therefore - like war-related sabotage - constitute a war peril that is covered by both sub-clause 1 (a) and (c). It is probably necessary to go one step further: acts of terrorism carried out in peacetime by resistance groups may also be so extensive that a "war-like condition" must be said to exist, see *Brækhus/Rein, Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 78. However, whether the act in question is regarded as an act of terrorism or as part of the conduct of war or a war-like act has no significance in practice for the cover.

As in the case of "sabotage", however, it is necessary to maintain that an act of terrorism must have or purport to have its basis in a more comprehensive struggle of a political or social nature. Thus a distinction must be drawn between such acts and ordinary criminal acts, including blackmail, using bomb threats, etc., purely for the purpose of gain, cf. for instance ND 1990.140 NV PETER WESSEL.

The wording "other social, religious or politically motivated use of violence or threat of the use of violence" include acts that bear clear similarities to sabotage and acts of terrorism in that they entail the use of violence or threat of the use of violence that is not for the purpose of personal gain. The criteria as regards to motivation are the same as those that apply to riots, sabotage and acts of terrorism and will normally involve several persons. However, the addition will also cover individuals who use violence for the aforementioned motives without this qualifying for description as sabotage.

"Strikes" occur where employees in one or more enterprises cease work according to a joint plan and with a joint motive.

"Lockout" entails that one or more employers shut the employees out from the work place, normally as part of an ongoing wage conflict.

*Sub-clause 1 (d)* covers piracy and mutiny. The text of the Plan is unchanged, but the Commentary to the term "piracy" was amended in the 2010 Version.

In earlier versions of the Plan, the term "piracy" was defined as illegal use of force by private individuals in open sea against a ship with crew, passengers and cargo. The wording "open sea" was

the English translation of the Norwegian wording “det åpne hav”, which corresponds to the wording used in the Norwegian translation of the wording “high seas” in Article 101 of the United Nations Convention on the Law of the Sea, where piracy consists only of acts committed on the high seas, and not within the territorial limit of any coastal state. The provision must be seen in conjunction with Article 105, which allows States to prosecute this type of crime outside the States’ normal jurisdiction. It has therefore been asserted that the term “piracy” in the Plan only covers illegal use of force outside the jurisdiction of the coastal state, and in any event outside the territorial limit of 12 nautical miles. However, the wording “det åpne hav” or “open sea” (in the Norwegian text) was taken from the construction of the corresponding provision in the 1964 Plan in Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), and in 1964 there were no corresponding clear international rules on the jurisdiction of coastal states. It was therefore uncertain whether the geographical delimitation should be linked to the issue of jurisdiction. However, there was also doubt as to how the term “det åpne hav” or “open sea” should be construed if it is not linked to international rules of jurisdiction. The state of the law on this point was therefore very uncertain.

In the current situation where piracy has again become a significant risk factor, it is unsatisfactory that there is an unclear geographical line between ordinary crime, which is a marine peril, and piracy, which is a war peril. The parties have pointed out that as a result of the increase in the illegal use of force, there is a need for war risk insurers to assume cover against this peril closer to land than the limit of the territorial waters or “the high seas”, as the case may be. The purpose of regulating piracy in the Law of the Sea Convention is, as mentioned above, to give States the possibility of prosecuting such crime outside their ordinary jurisdiction, and it is not necessarily the case that this delimitation is suitable for regulating piracy in the context of insurance law. The illegal use of force does not change in nature depending on whether the attack is outside or inside the economic zone or territorial limit. War risk insurers may change the trading area with immediate effect as the war peril changes, pursuant to the insurance conditions and according to practice, cf. Cl. 15-9. War risk insurers may also charge an additional premium as a condition for sailing in conditional trading areas. Marine risk insurers have neither a tradition nor the legal authority for making such changes.

The Committee therefore agrees that the geographical limitation linking piracy to “the high seas” is inappropriate, and that the term “piracy” in the Plan must be uncoupled from both the term “open sea” and the international legal definition in Article 101 of the Law of the Sea Convention.

This means that in relation to war risk insurance “piracy” may also take place within the territorial limit of a coastal state. How close to land the limit lies and which other delimitation criteria apply have been topics of discussion. The consideration of what it is natural to consider a war risk as opposed to “ordinary crime” which naturally belongs in the range of marine perils must be weighed against the consideration of establishing a simple, practicable limit. Moreover, when establishing a more specific delimitation, a distinction must be made between merchant vessels that derive their

freight revenues from transporting goods and/or passengers from one port to another, and offshore installations that generate earnings by means of stationary operations in a field.

In the case of merchant ships, the Committee agrees that illegal use of force constitutes “piracy” as long as the ship is en route between two ports. Insofar as the ship is on its way from one port to another, therefore, it makes no difference whether the ship is inside or outside the territorial limit, or in “the high seas”. Under this approach, even illegal use of force on lakes with a waterway connection to a sea and rivers constitutes “piracy”. The Committee has discussed whether the limit for piracy should be drawn as far in as the ship’s anchorage in the port, but concluded that the limit must be drawn at the port limit. Therefore, the illegal use of force within the port limit is not “piracy”. This applies regardless of whether the ship is sailing in the port area or is anchored or moored, and regardless of whether the ship is lying at anchor at an ordinary anchorage for this port. The same applies to attacks while the ship is loading or discharging at a terminal. A key element in the concept of “piracy” in relation to merchant ships is that the use of force takes place at sea, making it difficult for the port State authorities to provide assistance. If the use of force takes place while the ship is within the port area, it is more natural to compare this with ordinary crime that is dealt with by the port State authorities.

The basic principle above is that the ship must be underway for an act to be piracy. However, there may be a need for war risk insurance even when the ship is temporarily anchored. Based on the considerations relating to the port limit above, the Committee has concluded that the illegal use of force against a ship that is temporarily anchored outside the port limit also constitutes piracy, even if the ship is anchored at an ordinary anchorage for the port in question. It is also piracy if the ship is attacked while it is at rest in the process of dynamic positioning or is loading from or discharging to a loading buoy outside the port area. When the ship is outside the port limit, it is more difficult for the port authorities to intervene in the event of an attack. Such an approach also concords with English law.

If the port limit has not been defined, the limit must be drawn on a discretionary basis depending on whether the use of force is in the nature of a civil peril risk or a war peril. On the one hand, the war risk insurance must obviously not cover anything that must be considered an ordinary crime of gain that is naturally dealt with by the port State authorities. On the other hand, it is important to cover the use of force by private individuals in an organised manner and the use of weapons that is more in the nature of a war peril. In countries with limited infrastructure where ports are poorly organised, there may, depending on the circumstances, be reason to let “piracy” cover attacks on ships that are temporarily anchored relatively close to land. The decisive factor must be that the way in which the use of force is organised and the use of weapons are in the nature of a war peril and not that of ordinary crime that can be dealt with by the port State authorities.

The shipowners have pointed out that the criterion “underway” is not suitable either for offshore units, dynamically positioned ships and other types of ship designed for stationary operation in a field, and which therefore are not “underway”. Consequently, in the case of such units, the Committee has decided that “piracy” is to include illegal attacks on the unit while it is operating in the field, regardless of whether the field is located in “open sea” or the high seas. This kind of situation is in the nature of a war risk in the sense that the use of force necessitates a certain amount of organisation, in addition to which it takes place at some distance from land and the control of the authorities. Since the Committee has now decided that the illegal use of force against merchant ships will constitute piracy all the way to the port limit, it makes no difference how far from land the unit is operating. Since it has been decided that “the high seas” is no longer to apply as a criterion, piracy may also comprise e.g. the illegal use of force in a river delta.

The rule that attacks on units while they are laid up or under repair at or near a shipyard are to be regarded as a marine peril also applies to offshore units. Ordinarily, offshore units will not lie at or near a shipyard in the same way as a merchant ship. If the unit has been taken out of operation and moved from the field in order to make repairs, the stay at the place where the repairs are made must be regarded as a repair period. Attacks while the unit is being moved from the field to or from the place in which it is to be laid up or repaired shall be covered by the war risk insurance provided the moving process takes place outside the port limit.

The use of force may take place by means of another ship, but the pirates may also have come aboard as members of the crew or passengers on the ship which they subsequently plunder. The purpose will normally be economic profit, but an action that merely results in property damage or personal injury may also constitute piracy. Piracy will often be organized by people who purport to exercise government authority (e.g., an exile government that captures vessels to call global attention to their cause or in order to finance their revolt). The practical difficulties that would arise if a distinction had to be made between “piracy” and “measures by a foreign State power” are avoided by piracy being covered by the war-risks insurance, cf. sub-clause 1 (d).

“Mutiny” means insurrection by the crew against the officers, cf. Section 312 of the Norwegian Penal Code. This alternative will hardly be of any major practical significance. It has been placed within the range of war risks *inter alia* because it may be difficult to distinguish between mutiny and piracy, typically where bandits who have signed on as ordinary crew members incite mutiny.

*Sub-clause 2 (a)* is identical to Cl. 2-8 (d) and reference is made to the comments above.

The exceptions in Cl. 2-9, sub-clause 2 (b), are identical to the exceptions in Cl. 2-8 (e), except for cover of the use of radioactive isotopes for peaceful purposes, which is not relevant in a war-risks insurance. Reference is otherwise made to the Commentary on Cl. 2-8 (e) (1)–(5).

**Sub-clause 2 (c) excludes requisition by State power, cf. above. The provision is identical to Cl. 2-8 (c) and reference is made to the comments to this provision.**

### **Clause 2-10. Perils insured against when no agreement has been made as to what perils are covered by the insurance**

This Clause is identical to Cl. 17 of the 1964 Plan.

In practice, it will almost always be clear between the parties whether it is an insurance against war perils or an insurance against marine perils which is effected. Even though the provision is thus rendered less significant, the clarification was considered appropriate.

### **Clause 2-11. Causation. Incidence of loss**

**The Commentary was amended in the 2019 Version.**

#### *Introduction*

Cl. 2-11 regulates the issues of causation and incidence of loss. The provision firstly states the general requirement that there should be a causal connection between the insured peril and the loss suffered by the assured, the insured interest. It does not specify the nature of the causal connection that is required. Secondly, it contains rules for deciding incidence of loss issues. Since marine insurance contracts only provide cover for a defined period of time it is necessary to have rules that determine when a loss must be deemed to have occurred so that it can be allocated to the appropriate insurance period. This issue is often referred to as one of determining the “incidence of loss” – “periodisering” in Norwegian.

The main rule in Cl. 2-11 sub-clause 1 has remained unchanged since 1930. The so-called “anti-Hektor” rule now contained in Cl. 2-11 sub-clause 2 and sub-clause 3 has been simplified in an attempt to achieve greater clarity. However, the special rule applicable to losses arising from known defects or damage which was unique to the Plan has been changed.

In explaining the effect of the various provisions in Cl. 2-11 it is important to make three points at the outset. Firstly, other major systems do not contain specific written rules on this subject, which is normally dealt with by case law and practice. Since Cl. 2-11 is in the general part of the Plan, it applies to all Plan insurances including the various liability insurances contained in Chapters 13, 14, 15, 17 and 19. This helps to explain why the main rule in Cl. 2-11 sub-clause 1 is so general in scope. Secondly, the factual situations that can arise are extremely varied and complex, especially in relation to hidden processes, and there are a number of often conflicting considerations that must be taken into account, see below in the Commentary to Cl. 2-11 sub-clause 2 and sub-clause 3. It is not possible or even desirable to formulate rules that regulate every imaginable situation. What is needed are clear

principles that are determinative of the most common cases at the same time as they provide a consistent framework for evaluating how to decide the more complex cases.

Thirdly, it is also important to keep in mind that these issues arise in respect of recoverable claims. The right of the assured to claim is not at issue. It is true that the assured's claim can be affected by differences in deductibles, insurance contract limits or specific exclusions that can vary in different insurance contract periods but the sole purpose of the rules in 2-11 is to clarify which insurer is liable.

#### *Cl. 2-11 sub-clause 1 The main rule*

The wording of the main rule in Cl. 2-11 sub-clause 1 refers to the *insured interest* being struck by an insured peril. It does not refer to the insured object, which is usually a vessel, being struck. In the case of hull and hull related insurances, this means that actual damage to the vessel need not occur during the insurance period. It is sufficient that the operation of the peril has advanced to a stage which makes future loss of the kind covered by the relevant insurance contract almost inevitable unless extraordinary preventive measures are taken. There are many practical examples where this can occur. A vessel may run aground or be stuck in ice without being damaged in one insurance period, but may suffer damage as a consequence in the next. If a vessel is captured by pirates, it might not suffer actual physical damage until long after the date of capture during a new insurance period. Or a vessel might be blocked in a harbour by war perils and become a total loss as provided for in Cl. 15-12 after 12 months has elapsed by which time the insurance contract on risk at the time the blocking commenced will have expired. In all of these cases it is obvious that the peril has struck at the time the insured peril has materialized to the extent of creating the critical situation, and all losses flowing from that situation must be covered by the insurance contract on risk at that time.

The examples illustrate that the word “strike” presumes some kind of activity from the peril. This means that the general risk that a peril represents must have produced some concrete and specific result. A natural point of reference and the earliest point at which a peril can be said to have struck in the kind of open cases that fall within the main rule, is provided by the rules in Cl. 3-30 and Cl. 4-7. The assured's duty to do what is reasonably possible to minimise or prevent loss arises when “....a casualty threatens to occur or has occurred”, Cl. 3-30. Similarly Cl. 4-7, which imposes upon the insurer an obligation to pay the costs of extraordinary measures taken to minimise or prevent loss in accordance with Clauses 4-8 to 4-12, applies when “a casualty has occurred or threatens to occur”. The extent of the threat, that is the degree of danger required, is similar to that necessary to justify a general average act or salvage operation. There must be an imminent danger that loss covered by the insurance in question will arise, and the situation must be so acute that loss can only be avoided by extraordinary measures.

Once such a situation has arisen, then clearly an insured peril per definition must have struck since the insurer on risk at the time is obliged to pay for the costs of the reasonable measures taken even though no actual physical damage occurs. Any subsequent loss which can be regarded as part of the same casualty will also of course be referred back to the same point in time. The rule in Cl. 4-7 is consistent with what has already been said about the need for the peril to have had specific and concrete consequences. A general increase in the level of risk is not enough. If for instance a vessel leaves port without adequate navigation equipment and as a result runs aground at a later stage of the voyage one cannot say that the risk or peril of sailing without proper equipment has struck at the time the vessel leaves port. It is only when the vessel comes out of course and runs aground or is in imminent danger of running aground that the risk becomes so concrete and specific that the peril can be said to have struck. The very large range of possible outcomes that existed at the time the vessel left port has been narrowed down to a very few specific possibilities of which the most likely is that the vessel will suffer loss of the kind covered by the insurance contract.

Damage to a vessel can of course occur without there being an opportunity to take preventive measures. Events may move very rapidly as in the case of fire or explosion or a collision or a part of the vessel may be damaged because of some unknown defect. Clearly in the case of hull and hull related insurances, if a peril has not struck by creating a critical situation that would fall within Cl. 3-30 and Cl. 4-7 it must at the very latest have struck once damage commences.

The peril struck rule also functions satisfactorily in the case of liability insurance. The assured's liability arises from some tortious act, and the "liability interest" is therefore struck at the time the act was committed. Examples would be negligent navigation leading up to a collision or the negligent act of wrongly operating a valve so that bunkers are leaked into a harbour. In the second case the actual pollution damage and consequent economic loss to third party interests will arise some time after the tortious act, but the peril clearly struck at the time of the negligent operation of the valve.

All systems of marine insurance have rules equivalent to Cl. 3-30 and Cl. 4-7. All the examples mentioned so far would lead to the same result in other systems in those cases where the actual damage occurs in a later insurance period, although the result might sometimes be explained or justified in a different way. It can be concluded that the results are necessary and natural for the following reasons:

- The assured would be put in an impossible position if losses occurring after the expiry of the insurance period arising from e.g. grounding or seizure by pirates during the insurance period were not covered. Arranging new insurance for a vessel that is already aground or which has been seized by pirates, is not a practical proposition.

- The peril struck rule allocates losses as between successive insurers in a way that seems intuitively fair and reasonable. The allocation will be consistent from year to year so that in the long run all insurers are likely to end up being equally affected.
- The peril struck rule is consistent with rules concerning the duty of the assured to prevent loss and the liability of the insurer to cover the reasonable costs involved.

It is in accordance with the way incidence of loss issues are handled in liability insurance, and is in harmony with the way causation and one casualty issues are dealt with.

Alternatives to the peril struck principle allocate losses to the time that damage occurs or to the time at which damage manifests itself or is discovered. Under the Plan, a version of the damage occurs principle is used in the cases regulated by Cl. 2-11 sub-clause 2 and sub-clause 3, and the burden of proof rules as explained in the Commentary to Cl. 2-12 operate with a presumption in favour of the time of discovery. In this way each principle is used in its most appropriate context.

*Cl. 2-11 sub-clause 2 and sub-clause 3 Loss arising from an unknown defect or damage*

In all the cases mentioned in connection with the main rule in Cl. 2-11 sub-clause 1, the chain of events is open and transparent. Events unfold continuously, usually over a relatively limited period of time and it is assumed that all the relevant facts and their timing are known. Difficulties in relation to incidence of loss arise for one of two reasons or a combination of them. A pre-existing unknown defect or damage which has its origin in one insurance period gives rise to new damage during a later insurance period. The progress of events remains hidden until either damage is discovered or there is a sudden breakdown of part of the vessel often resulting in new damage to other parts. In extreme cases the vessel may become a total loss or be put in imminent danger and require salvage services.

Secondly, because of the hidden nature of the original defect or damage and the time that elapses prior to discovery or breakdown, it is often difficult to establish a clear picture of all the relevant facts and their exact timing. The first type of situation is regulated by Cl. 2-11 sub-clause 2 and sub-clause 3, and the second by the rules as to burden of proof, see the Commentary to Cl. 2-12.

The problems that arise in the first type of case came into focus by the Hektor case, ND 1950 458 NH, which in turn led to the introduction into the 1964 Plan of the rule known as the “anti-Hektor” Clause, now found in Cl. 2-11 sub-clause 2 of the 1996 Plan in a modified version.

In the original Hektor case, the vessel suffered damage as a result of a bomb attack in 1945 while it was in dock. The damage was repaired, but later in a new insurance period the rudder fell off during a bout of severe heavy weather. It was assumed that the rudder heel must have been weakened or damaged by the bomb blast, that it was not possible to discover this, and that the effect of normal use culminating in the bout of severe heavy weather caused the rudder heel to break and the rudder to fall off.

In the case itself it was decided that the cost of repairing the rudder heel must be covered by the original war insurer as part of the bomb damage. The cost of replacing the rudder was apportioned 60/40 between the 1945 war insurer and the marine insurer on risk at the time it was lost, 1946. Although the result is not entirely illogical it was regarded as unsatisfactory from a practical point of view. Firstly applying the rules as they were then understood required considerable expenditure on technical investigations. Secondly, the conclusion could only be reached on the basis of a difficult evaluation of contributing causes, and thirdly, the conclusion made it necessary to carry part of the loss back to an earlier insurance contract. A clarifying rule was therefore introduced into the 1964 Plan to the effect that unknown damage or weakness should always be regarded as a marine peril that strikes at the time the new damage and any associated losses occur.

The rules now contained in Cl. 2-11 sub-clause 2 and sub-clause 3 maintain this solution, making it clear that any unknown defect or damage, irrespective of its origins, must be regarded as creating a marine risk. Consistent with what has been said about the main rule in the Commentary to Cl. 2-11 sub-clause 1, this risk or peril accompanies the vessel until such time as it materializes in some specific further consequence. It cannot be said to have struck until it either causes (further) damage or creates a situation of imminent danger of damage as required by Cl. 4-7. Today the result of the Hektor case would be that the loss of the rudder would be allocated to the marine insurance on risk at the time of its loss. The costs of repairing the weakened or damaged rudder heel would still be covered by the war insurance on risk when the bomb blast occurred. Under other international systems loss would also be allocated to an insurance contract on risk at the time of the loss, but it is quite possible that it would be allocated to the war insurance on the basis that the original war damage was the dominant cause. The Plan rule has the practical advantage of removing the need for any evaluation as to the cause of the defect or weakness.

Cl. 2-11 sub-clause 2 of the 1996 Plan has been simplified by disentangling its three interwoven strands. Reference to known damage has been removed and dealt with separately in Cl. 2-11 sub-clause 4 and although the damage occurred principle is applicable in both cases, the rule in respect of unknown damage has been separated from the rule for unknown defects.

There are three main variants of the “damage occurred” rule. It can mean that damage should be allocated:

- only to the insurance contract on risk at the time the damage first commenced, or
- over all insurance contracts on risk at the time that damage in fact occurs so that where damage occurs progressively over time in different insurance periods, liability must be apportioned over all the insurance contracts concerned, or

- to the insurance contract on risk at the time the damage manifests itself or is discovered.

This alternative is closely related to the second alternative.

There are advantages and disadvantages to each of these three variants and in some cases they could all give the same result. The key design considerations in establishing a set of functional rules for incidence of loss cases are of particular relevance in this area and can be formulated as follows:

- Insurers should not be liable for damage existing at the time the risk commenced, but they do accept the risks of new losses that arise from unknown defects assuming of course that there has not been any breach of the duty of disclosure.
- While a “fair” allocation as between successive insurance contracts has a value this does not have to be done down to the last dollar and cent. A fairly rough but consistent approach is sufficient.
- The rules as to incidence of loss must operate independently of rules that determine the validity and quantum of the assured’s claim.
- It is practically inconvenient for both insurers and assureds to have liability allocated backwards in time. The further into the past liability is placed the greater the inconvenience and the greater the chance that an underwriter of the insurance contract in question might no longer be in business.
- There should not be opportunities to manipulate the decision as to which insurance contract is liable.
- The rules should be as simple as possible to facilitate their application in everyday practical claims handling.

As already mentioned the unknown defects or damage are always regarded as a marine peril irrespective of their origin. They are assumed to have struck the interest insured (this expression is used for the sake of consistency with the wording of Cl. 2-11 sub-clause 1) at a single point in time – when the damage to the defective part itself or the extension of damage to other parts starts to develop. This means that the first of the three possible variants mentioned above has been chosen, considerably reducing the scope for apportionment over several insurance contracts. It is obviously simpler to claim against one insurance contract than to apportion over a series of contracts. It is true that the chosen solution places all the loss on the earliest insurance contract, but if apportionment is adopted then that insurance contract will have to be involved in the settlement in any event. For the insurers involved, the end result over time for any portfolio of claims will almost certainly be the same.

The third possible variant is obviously impractical if it is understood in the broad sense that all damage is to be allocated to the insurance contract on risk at the time it is discovered, even if it is quite clear that the damage must already have been present prior to the inception of the insurance contract.

The opportunities for manipulation and fraud create a moral hazard unacceptable to insurers. No other system contains a general rule to this effect.

The term defect in Cl. 2-11 sub-clause 2 refers to some aspect of the vessel as such that needs to be rectified once it has been discovered. It can have arisen during construction or repair and be the result of error in design, the use of faulty or inappropriate material, faulty workmanship or mis-assembly. However, the original Norwegian text uses the word “svakhet”, literally “weakness” and a vessel may have sub-optimal features which it would be impracticable to remedy. These are usually known both to Owners and insurers but should a hitherto unknown weakness give rise to damage then it must be regarded as a defect and the case would fall within Cl. 2-11 sub-clause 2 if the claim is not excluded by Cl. 12-3.

Contaminated bunkers, lube oil or boiler feed water sometimes referred to as “system faults” are not defects within the meaning of 2-11.2. Loss arising from these causes is regulated by the main peril struck rule. In practice loss would be allocated to the time when the contaminated bunkers etc. are taken in use this also being the time when damage would normally commence.

Cl. 2-11 sub-clause 3 refers to “damage in one part of the vessel” resulting in “damage to other parts of the vessel”. As already mentioned liability for the original damage must be allocated to the appropriate point in time when the relevant peril struck, usually in a previous insurance period. It is only the incidence of consequential damage that is regulated in Cl. 2-11 sub-clause 3. The provision raises the issue of what is meant by “part”. This question also arises in connection with Cl. 12-3 and Cl. 12-4. The main practical application of this paragraph is in respect of machinery damage, a context in which it is reasonably easy to identify the various parts and components, see further the Commentary to Cl. 12-4. Practical common sense is especially necessary in some cases of hull damage. This is illustrated by example 2 below.

As example 3 shows it is quite possible to have a situation governed by Cl. 2-11 sub-clause 2 followed by one that falls within Cl. 2-11 sub-clause 3. A defective part starts to develop damage and then subsequently breaks down causing damage to other parts. If the damage to the defective part occurs in one insurance period and the damage to other parts in a later period then both the relevant insurance contracts will be involved, the first by operation of Cl. 2-11 sub-clause 2 and the second by virtue of Cl. 2-11 sub-clause 3.

Loss of Hire insurance is triggered by damage to the vessel which is recoverable under a hull insurance as specified in Cl. 16-1, sub-clause 1. This is the main peril or risk insured against under such an insurance contract. The events listed in Cl. 16-1 sub-clause 2 are unlikely to give rise to incidence of loss problems. The logical starting point is that a **loss of hire insurance** claim based on Cl. 16-1 sub-clause 1 should be allocated to the same point in time that has been identified for the

purposes of determining which hull insurance is liable for the relevant damage. **However, in case the hull insurance is subject to non-Plan conditions, there is a potential for divergence as to incidence of loss. Cl. 2-11 will obviously not be applicable for a hull insurance based on non-Plan conditions, whilst Part One of the Plan which includes Cl 2-11 is applicable for the loss of hire insurance.**

#### Example 1

A natural starting point in a review of examples of how Cl. 2-11 sub-clause 2 and 3 function is the case where the pre-existing defect or damage is discovered and creates a critical situation before any consequential damage occurs. We assume that the vessel is at sea and it becomes apparent that previously unknown cracks in the main engine bedplate have developed to a point where there is an acute danger of damage to the main engine if it continues to operate. It is therefore necessary to stop the main engine and seek assistance. The costs involved must be covered by the insurer benefitted, namely the insurer on risk at the time the critical Cl. 4-7 situation arose. This is the insurer who in accordance with Cl. 2-11 sub-clause 3 would have been liable if consequential loss or damage had not been mitigated or prevented. If despite the efforts made the vessel should e.g. run aground, then the losses incurred will as is normal all fall upon the insurer on risk at the time the critical situation occurred. This solution gives effect to the words “has occurred or threatens to occur” in Cl. 4-7 and assumes that these words must be read into Cl. 2-11 sub-clause 2 and sub-clause 3. The cost of repairing or replacing the bed plate will fall upon the insurer on risk at the time the cracks first began to develop since the bedplate is a single part. We are assuming that recovery is possible under Cl. 12-4. There may well be uncertainty about when damage commenced but this issue is taken care of by the burden of proof rules.

#### Example 2

A vessel runs aground but the Master takes the view after a divers’ inspection that the damage is not serious and decides that further inspection and repairs can be postponed until the next dry docking. At the dry docking two years later it becomes clear that the grounding damage was more serious than had been realized, and that the failure to repair had led to further damage in the surrounding areas of the hull bottom. The natural solution here is to allow all damage to be covered by the insurance contract on risk at the time of the grounding under the main peril struck rule. It could be argued that the various shell plates and internal structures should be regarded as different parts so that the case could come within Cl. 2-11, sub-clause 3. Consistent with the practice used in applying Cl. 12-3 one could regard at least the major components in the hull structure as separate parts. One might therefore conclude that as a starting point one should apply Cl. 2-12, sub-clause 3, and try and place damage to separate parts on separate insurance contracts. Common sense would however dictate otherwise. It will be difficult to distinguish the cost of repairing the original from the later damage and therefore it would make sense for the claims leader to allocate all damage to the original grounding.

On the other hand if the unrepaired grounding damage had at a later stage caused the vessel to take in water, perhaps entering the machine room, creating a salvage situation or even ultimately causing a total loss, then clearly Cl. 2-11 sub-clause 3 must be applied to achieve the obviously necessary result that damage to the machinery and any salvage costs or a total loss would be allocated to the insurance contract on risk at the time damage to other parts started to develop as the vessel started to take in water.

### Example 3

A slightly modified version of a recent case is as follows: A vessel is delivered in Y1 (year 1) with an unknown defect in the form of a casting defect in the main engine crankshaft. At some stage this defect leads to small fractures. The evidence is clear that this must have occurred at the latest by Y5. The fractures continue to develop and towards the end of Y8 there is a main engine breakdown while the vessel is close to shore. The vessel runs aground, suffers grounding damage and is finally salvaged and repaired early in Y9. Cl. 2-11, sub-clause 2, requires that the entire cost of replacing the crankshaft should be allocated to Y5. There does not seem to be any compelling reason to apportion over the years Y5 to Y8 since one has to go back to the Y5 insurance contract anyway and in all probability the crankshaft would have had to be replaced or undergo a very expensive repair if the damage had been discovered in Y5. In accordance with Cl. 2-11, sub-clause 3, all consequential losses to other parts of the main engine and all other losses associated with the grounding and salvage would have to be covered by the Y8 insurance contract. In Y8 the crankshaft had unknown damage that resulted in damage to other parts. The pre-existing damage is therefore to be seen as a marine peril that struck at the time the consequential damaged commenced. This embraces all losses arising as a consequence of the breakdown i.e. not only the damage to other parts of the main engine but also the grounding damage and the cost of salvage. All the losses starting with the damage to the crankshaft would be regarded as belonging to the same casualty for the purpose of applying the agreed deductibles under the hull insurance contracts for Y5 and Y8. Any difference in these deductibles would be resolved by applying them proportionately relative to the amounts recoverable under each of the two insurance contracts.

### Example 4

Norwegian practice has not favoured apportionment over successive insurance contracts where a part has been damaged by a slow process of fatigue and the rule in Cl. 2-11 sub-clause 2 and sub-clause 3 deliberately continues this tradition by allocating all liability for the damaged part to the first insurance contract. However, it is possible to think of cases where damage spreads from one part to the next in one year and then to other parts the year after. We assume the following facts: A crack in a main engine bed plate develops in a position that affects a main bearing so that it wears excessively. After a period stretching into a new insurance period the bearing fails damaging the crankshaft which has to be replaced. If we assume that the timing of the damage can be clearly established so that there are no burden of proof issues, then the effect of Cl. 2-11 sub-clause 3 will be to allocate liability for each part

to each of three appropriate insurance contracts that is the insurance contract on risk at the time the damage to each part started to develop. This is not strictly an apportionment since it is the cost of repairing or replacing each part that falls on the respective insurance contracts and obviously the costs can vary considerably. The costs are not spread evenly over the three insurance contracts. Very often in such cases the exact timing of the damage to each part cannot be established with certainty. Where the exact timing is unclear, the burden of proof rules make it possible to find a pragmatic solution which could conceivably involve a form of apportionment over two or more insurance contracts of some of the losses. In the above example the cost of replacing the crankshaft will probably be the major item and there will be no doubt that this must be allocated to the insurance contract on risk at the time of the bearing failure. However, it might be a sensible compromise to use some form of apportionment in respect of the other losses if there is no clear evidence as to their timing, but this is something that must be left to the skill and experience of the claims leader and adjuster in dialogue with the parties concerned.

#### Known defects or damage

It is not uncommon to postpone repairs or replacement of parts of the vessel that are known to be damaged or suffer from some form of defect. There will often be sound practical and operational reasons for the decision which is usually taken in consultation with class. Where repairs are postponed or partial or temporary repairs are carried out, the development of further damage to the damaged part or parts unrelated to any new event must obviously be covered by the original insurer. However, incidence of loss issues can arise if the decision to postpone remedial action turns out to be a misjudgement and damage or new damage to other parts arises as a consequence of the original defect or damage. In other words essentially the same issues arise as dealt with by Cl. 2-11 sub-clause 2 and sub-clause 3 except that the defect or existing damage is known. The starting point is that the decision to continue operating the vessel and postpone remedial action despite the existence of the defect or damage, however justified, represents a risk or peril. Any subsequent damage or casualty will be governed by the main rule in Cl. 2-11 sub-clause 1 and the resulting losses must be covered by the insurance contract on risk at the time damage commences or when the need for extraordinary measures to prevent loss arises. As explained, it is at this point that the risk or peril strikes the interest insured.

Three types of situation can be distinguished.

- The existence of the defect or damage is reported to the insurer at the time it is discovered and to subsequent insurers at each renewal. Equivalent to this situation is also that where the insurer on risk at the time (new) damage occurs has been informed at the time of renewal.
- The defect or damage is reported to the insurer when it is discovered but is not disclosed to new insurers at some subsequent renewal.
- The existence of the defect or damage is not disclosed to any insurer.

The first situation will normally be the most common and since the matter in question will often fall within the scope of the duty of disclosure the assured would run the risk of losing cover in the second and third situations if insurers are not kept informed. It is however possible that the matter falls outside the scope of the duty of disclosure because available expertise believes that there is no danger of any future damage or that the assured's failure cannot be regarded either as wilful or negligent so that the insurer's only remedy is to cancel the insurance by giving 14 days notice, see Cl. 3-4, liability for losses that have already occurred remaining unaffected.

The assured has a duty to take action if he knows or has reasonable grounds for suspecting that the insured vessel suffers from some type of defect, e.g. if an error in design or construction is discovered in a series of sister vessels. The cost of remedying the defect is not covered by insurance and there can be a real temptation to wait until the defect leads to damage in order to be able to have the cost of repairs covered by insurance. This issue of moral hazard was strongly in focus during the drafting of the 1964 Plan and led to the introduction of the "known defect or damage" rule in the then paragraph 18 which was maintained in Cl. 2-11 sub-clause 2 of the 1996 Plan which states that where unknown defects or damage results in a new casualty, the defect or damage shall be regarded as a marine peril that strikes the ship at the time the casualty or damage occurs "*or at such earlier time as the defect or the first damage became known.*" Taken literally this wording applies to all three of the situations listed above, including the first where insurers have been kept fully informed so that there can be no question of any manipulation by the assured. While it is easy to see the potential for manipulation in situations two and three above, it is difficult to see why the insurer on risk at the time the damage or defect became known should remain liable for events occurring after the expiry of his insurance period. Difficult questions can also arise as to the degree of knowledge required and as to whose knowledge is relevant.

In cases where insurers have been kept informed, each insurer is able to negotiate the terms and price that they think appropriate on the basis of the information available to them. The decision to continue operating the vessel and postpone remedial action despite the existence of the defect or damage however justified, means that the inherent risk created by the defect or damage retains whatever potential it might have to create new losses. Each insurer must then live with the terms and conditions they have agreed and must cover the losses that might occur during the insurance period. This is also in conformity with the general principle that while each successive insurer should not be liable for damage that has occurred prior to the commencement of the risk, each successive insurer does, subject to proper disclosure, accept the risk of any future losses that arise from the known or unknown state of the vessel at that time.

After discussion and review it was decided that the special rule in the 1996 Plan was also inappropriate for the second and third cases mentioned above. This means that assuming that there has not been any breach of the duty of disclosure that would allow the insurer to avoid liability, one returns to the normal starting point in Cl. 2-11 sub-clause 1. This also gives results that fully conform with those that would follow in other systems.

*Cl. 2-11 sub-clause 4 Limitation of the insurer's liability in respect of losses arising from defects or damage that were known by the assured but not by the insurer*

The special rule in respect of “known” defects or damage introduced in 1964 has been deleted. The new rule in Cl. 2-11 sub-clause 4 now addresses the issue of moral hazard in situations where the assured knows of a defect or damage but the insurer does not. It is very difficult for the insurer to avoid liability on the basis of Cl. 3-2 or Cl. 3-3 or possibly Cl. 3-33 so that there is a need for a more clear cut rule unrelated to the assured's state of mind. The key difference between the old and the new rule is that, consistent with the main rule in Cl. 2-11 sub-clause 1 the new rule does not transfer liability back to an earlier insurance contract but places liability for consequential damage on the insurer on risk at the time the risk created by the known defect or damage materializes in the form of damage or the creation of a critical situation. The question of whether and when the assured acquired the degree of knowledge required to trigger Cl. 2-11 sub-clause 4 must be decided in accordance with the normal rules as to identification in Clauses 3-36 to 3-38.

The rule in Cl. 2-11 sub-clause 4 comes in addition to any rights the insurer might have under the disclosure rules.

## **Clause 2-12. Main rule relating to the burden of proof**

The wording of Cl. 2-12 has not been amended, but the Commentary has been rewritten for the 2013 Plan.

Burden of proof rules identify which party in a legal dispute carries the risk that doubt exists in relation to facts that are essential for a party's case. In insurance cases as in other private law areas the general rule is that facts need only be established on a balance of probabilities. It must be more likely than not that an essential fact has occurred or is true. As a starting point this is the standard of proof to be applied under the Plan.

Reflecting general insurance law, sub-clause 1 states the matters that must be established in order to make a claim under a Plan insurance; namely that the assured has suffered a loss of the kind covered by the insurance and its extent. Properly understood, this requirement in fact involves four specific items namely proof that:

- the assured has an insurable interest in the sense that he has suffered actual economic loss of the kind that is covered by the insurance in question,
- the assured's economic loss has arisen from events (perils) of the kind specified in the relevant insurance,
- that the loss occurred during the insurance period, and
- the extent or quantum of the loss.

In relation to the second point above, this means that once the assured has proved that an insured event has occurred, e.g. in the case of hull insurance damage to the vessel, then as sub-clause 2 provides the burden of proving that the damage was caused by an excluded peril falls upon the insurer unless other provisions of the Plan provide otherwise. This means that subject to any specific contrary rule, the assured must establish the three other bullet points listed above.

There are a number of specific exceptions to the rule in sub-clause 2 in addition to those in sub-clause 3. These issues are dealt with in greater detail below and thereafter the special case of the burden of proof in relation to Cl. 2-11, incidence of loss is discussed.

Further comments on Cl. 2-12, sub-clause 2, and various exceptions including those in sub-clause 3.

In practice the most frequently occurring critical issues arise when the insurer alleges that a loss has been caused by a breach of one of the assured's duties so that recovery is excluded in whole or in part. The most important exceptions to the rule in sub-clause 2 relate to this kind of case. Cases where the burden of proof rules can determine whether the assured has a valid claim or not can be distinguished from those where it is clear that the assured has a valid claim but the facts in issue will determine which insurance contract is liable, e.g. cases of damage to a vessel which must have been caused by either marine or war perils. This is specifically regulated in Cl. 2-16 which has its own Commentary. Another example would be cases where there is doubt as to when damage occurred so that the question is which of several successive insurance contracts should respond, as discussed below. These cases are less critical for both assured and insurers, and the rule in Cl. 5-8 requiring insurers to make a payment on account is designed to prevent practical inconvenience to the assured during the time needed to achieve a final decision.

Obviously the burden of proving that the assured has committed a breach of duty rests upon the insurer, but depending on the circumstances it may be reasonable to transfer the burden of proof back to the assured once the insurer has done enough to establish a *prima facie* case.

Cl. 3-3, sub-clause 2, and Cl. 3-9, sub-clause 2, apply to a negligent breach of the duty of disclosure and alteration of risk respectively, and provide that if the insurer has first established that he would

only have accepted the insurance but subject to different conditions, then the assured has the burden of proving that the loss was not caused by matters that should have been disclosed or which amount to an alteration of risk.

In Cl. 3-25 the insurer has the burden of proving that the assured has committed a breach of a safety regulation. Once this has been done the burden of proving that the loss was not caused by the breach or that the breach cannot be attributed to the fault of the assured falls upon the assured.

Similar examples of cases where the burden of proof is returned to the assured once the insurer has established certain facts can be found in Clause 3-18, sub-clause 3, and Cl. 3-23.

Cl. 2-12, sub-clause 3, places upon the assured the burden of proving that loss has not been caused by any of the perils listed in the so called RACE Clause – Radioactive Contamination Exclusion Clause, see Cl. 2-8 (e) and Cl. 2-9, sub-clause 2 (b). This Clause, which is universal both in direct and re-insurance marine insurance contracts, has its obvious justification in the danger of a massive accumulation of losses. Clearly the assured's burden of proof will in practice not be activated in every case but only in those rare cases where there is at least some evidence that one of the perils named might be involved.

#### *Burden of proof in relation to Cl. 2-11, incidence of loss*

In principle, the assured's burden of proof includes the need to prove the time at which the peril struck Cl. 2-11, sub-clause 1, or in the case of Cl. 2-11, sub-clauses 2 and 3, the time at which the damage started to develop. In practice, difficulties most commonly arise in connection with the application of sub-clauses 2 and 3. Obviously once it has been established that a loss covered by the insurance in question has occurred, the assured cannot be deprived of cover simply because it is not possible to prove that the loss probably occurred in one or another particular insurance period. If a loss is covered and it is equally likely that it occurred in one of several possible insurance periods, then it is necessary to have a mechanism for deciding which of the possible insurance contracts should respond. In some systems the solution is to apportion over the most relevant insurance contracts. As noted in the Commentary to Cl. 2-11 Norwegian practice does not favour apportionment over several insurance contracts, and this also applies to cases where it is unclear when loss actually occurred. In Norwegian practice one has sought to place the loss on one insurance contract using a presumption in favour of the insurance contract on risk at the time of discovery.

This approach can be described as follows:

Assume a series of insurance contracts starting with insurance period 0, the contract on risk at the time the damage is discovered. Number the successive previous contract periods as -1, -2, -3 etc.

The party alleging that the loss occurred in -1 rather than 0 must produce evidence that the loss

occurred in that period rather than in the current insurance period 0. Very often because of e.g. marine growth or rust or because period 0 has been on risk for only a short time, it will be quite clear that the loss could not have occurred in period 0. The next step is to look at period -1 and repeat the process. If it can be established that on the evidence the damage occurred in period -1, then the loss falls in that period for its entirety. If not, one proceeds to consider period -2. It can, of course easily happen that the facts make it clear that the loss must have occurred in a period spanning more than one contractual periods but it is impossible to narrow down the time of loss within that overall period. In such a case, the loss will fall upon the most recent of the contractual periods concerned. Thus, if it is clear to the required degree of certainty that the loss did not occur in period 0 and that it must have occurred after the expiry of period -3 but it is equally likely to have occurred in -1 or -2, then the loss will fall on -1 as being the most recent of the two possible contractual periods. Effectively this means that the burden of proving that the damage occurred in an earlier period rests on the party making the allegation. In some cases this may be the assured, the earlier insurance contract may have lower deductibles or higher limits. In others it might be an insurer who subscribes to the latest contractual period but not to the older one.

The crucial question that remains is the degree of proof required. What is required to rebut the presumption that loss occurred in the same period in which it was discovered? In principle, the general rule requiring proof on the balance of probabilities should apply, but in practice there has often seemed to be tendency to require something more. This also seems implicit to the rule in the Swedish Plan. As mentioned above, there will be many cases where it will be obvious from the technical evidence that damage could not have occurred in period 0. It is important for the long term credibility of the system that parties are not forced to allocate losses to a point in time that is clearly contrary to the available evidence. As pointed out in the Commentary to Cl. 2-11 an important design consideration is that insurers should not be made liable for damage that existed prior to the inception of the insurance contract. On the other hand, administrative efficiency favours a rule that allocates losses to period 0. The crucial issue boils down to how heavy the burden of proof should be on the party that wishes to place loss in an earlier contractual period. The natural conclusion from the practice referred to above is that something more than the balance of probabilities is required. At the same time it would be wrong to require the same degree of certainty that is required in criminal cases; namely beyond all reasonable doubt. The best way of expressing this burden is to say that the party wishing to establish that loss occurred in an earlier contractual period must do so on a clear preponderance of probabilities. Any statement as to the degree of certainty required in respect of the burden of proof will inevitably be prone to discussions and different evaluations of any given set of facts. However, requiring proof to a clear preponderance of probabilities – “klar overvekt av sannsynlighet” in Norwegian - should not be any more difficult than the alternatives and has the benefit of favouring practical solutions.

## Clause 2–13. Combination of perils

Sub-clause 2 was amended in the 2007 version. The Clause is otherwise identical to earlier versions of the 1996 Plan.

The provision maintains the rule of apportionment as the causation principle when a loss is caused by a combination of perils, i.e. when a loss is caused partly by a peril covered by the insurance and partly by a peril which is not covered by the insurance.

The question of the insurer's liability in the event of a combination of causes is a general problem. General Norwegian insurance law is based on what is known as the "dominant-cause doctrine". The dominant-cause doctrine is established through case law from the early 1900s and onwards, partly in connection with cases where an assured who has an accident insurance has died as a result of an accident as well as an illness (see in particular *Rt.* 1901.706, 1904.600 and the overview in *Rt.* 1933.931) and partly in cases concerning a combination of war perils and marine perils in marine insurance, cf. below. The causation principle entails establishing which peril constitutes "the dominant-cause factor" or "the dominant peril". The entire loss shall be allocated to the peril which is thus designated as the dominant cause. For the assured this means that he will either receive full cover or none at all, depending on which peril insured against is regarded as dominant.

Amongst scholars it has been assumed that the content of the dominant-cause doctrine varies, depending on the relevant stage in the course of events leading up to the damage. If it is a question of a combination of two or more perils leading up to a loss or damage, it is alleged that the traditional basis for the dominant-cause doctrine is followed and the relationship between the various perils is evaluated in order to find the "strongest" or "most significant" cause. However, if it is a situation where an insurance event has occurred in combination with a new peril, resulting in an increase in the loss or damage compared with a situation where the insurance event was the sole cause, the accepted view is that the insurance event is the dominant cause if it has been a necessary triggering factor and has contributed to the loss to such an extent that it would seem reasonable to let the assured benefit from the protection which the insurance was intended to provide. Only in a situation where the loss or damage could have occurred in the same way regardless of the insurance event will the new peril be characterised as the dominant cause.

In marine insurance the problem of the combination of causes arises in three situations, viz.:

(1) if the loss is attributable partly to perils covered by the insurance and partly to perils excluded from cover by an objective exclusion. The most common situation in practice is a combination of marine and war perils, but one might also mention the case (from hull insurance) where a part is damaged partly because of inadequate maintenance and partly because of the impact caused by a casualty;

(2) if the loss is partly attributable to perils covered by the insurance and partly to factors for which the assured, because of his subjective position, must bear the risk himself (undisclosed risk factors, breaches of safety regulations of which the assured was aware, gross negligence on the part of the assured during the rescue operation);

(3) if the loss is attributable to the materialization of perils insured against during several insurance years. For example, the ship sustains latent damage due to a casualty in 1994, and this damage, combined with heavy weather or some other peril in 1995, causes a new casualty.

In marine insurance the problem of a combination of perils was first noticed in cases involving a combination of marine and war perils. During World War I (1914-18), a large number of casualties of this nature took place. In a judgment of fundamental importance (*ND 1916.209 SKOTFOS*) the Admiralty Court, with the support of the Supreme Court, established that the entire loss was attributable to “the factor which is regarded as the dominant cause of the accident”. During the subsequent years a series of judgments were given in disputes between insurers against marine perils and insurers against war perils. A feature common to these decisions was that it required a very strong war peril for the court to regard that peril as the dominant cause. If errors of any significance had been committed by the crew, such errors were practically always regarded as the dominant cause, with the result that the casualty in its entirety fell upon the marine-risk insurer.

The marine-risk insurers objected to the fact that this led to a significant part of the increase of the marine risk attributable to a war situation (darkened lighthouses, removal of navigation marks, sailing in convoys etc.) being imposed on them. In connection with the revision of the Plan in 1930 it was therefore decided to adopt a rule of apportionment. In the event of a combination of causes, the relative strengths of the various perils were to be evaluated and the loss apportioned, taking into consideration the significance of the individual causal factors. Instead of a choice between two extreme solutions (either A or B being liable for the entire loss), this method offered a whole range of in-between solutions, making it possible to choose in each individual case the apportionment which would seem to best fit in the specific circumstances of the case.

The background for the introduction of the rule of apportionment in 1930 was the conflict between the insurers against marine and war perils, respectively. However, the rule of apportionment contained in the 1930 Plan was worded in very general terms, and was to be applied to all cases where there was a combination of perils insured against and uninsured perils, unless otherwise provided by other provisions of the Plan. However, the 1930 Plan also contained a number of rules which excluded the application of the rule of apportionment. They concerned first and foremost the limitations of liability relating to neglect or negligence on the part of the person effecting the insurance or the assured.

During World War II (1940-45), the rule of apportionment was applied in a very large number of cases concerning casualties which were partly attributable to war perils and partly to general marine perils. These questions are discussed thoroughly by *Bugge* in AfS 1.1 *et seq.* As regards ships sailing in German-controlled waters, the question of apportionment had to be decided by litigation in some 100 cases.

On account of this high incidence of litigation, the decision was made in the revision of the Plan in 1964 to revert to a dominant-cause rule in respect of the combination between war and marine perils, although in a modified version, cf. below in Cl. 2-14. The discretionary rule of apportionment was retained, however, for other combinations of causes and also made applicable in the event of a combination of perils insured against and perils which had arisen due to neglect or negligence on the part of the person effecting the insurance or the assured. The reason was that the rule of apportionment had gradually become part of the general conception of justice, and that it was applied fairly often in practical settlements. It was rarely used in case law, however.

During the revision, the issue of whether to revert to a dominant-cause rule for combinations of causation other than a combination of war and marine perils was considered as well. The advantage of such a solution would be to have a causation rule that concorded with general Norwegian insurance law as well as with international marine insurance. Technical considerations of law also point in favour of the dominant-cause rule: with a dominant-cause rule it is possible to build up a judicial precedent doctrine for typical cases, while it is necessary when using a rule of apportionment to make a discretionary apportionment, depending on the specific circumstances of each individual case. The high incidence of litigation during World War II in connection with a combination of war and marine perils illustrates this point. It may also be submitted that the rule of apportionment will probably give the assured a less favourable solution than the dominant-cause rule as regards a combination of a casualty that has taken place and subsequent perils. As mentioned above, the general tendency, in practice and theory, has been to go to great lengths to characterize the earlier casualty as the dominant cause. However, in the event of an apportionment, the assured will have to accept that the risk for the proportion of the loss or damage that corresponds to the significance of the uncovered peril falls upon him.

The conclusion was nevertheless that the most expedient approach would be to keep the rule of apportionment. The advantage of this solution is that the premium is in “correct” proportion to coverage in that the insurer is not held liable for the effect of causal factors that fall outside the scope of cover of the insurance. Considerations of fairness also favour such a solution: the assured has paid a premium to be covered against certain risk factors and has no reasonable claim to be covered against other perils.

A third advantage is in the relationship to the rules relating to the duties of disclosure and care: under relevant Nordic Insurance Contracts Acts (Nordic ICAs), a reduction system as regards the assured's breach of the duty system contained in Nordic ICAs has been established, which entails that the indemnity may be reduced if the assured's breach of duty has contributed to the damage. Such a system is less expedient in marine insurance: it is regarded as unfortunate for the insurer to be allowed to make a discretionary reduction based on *inter alia* considerations of degree of fault. By retaining the rule of apportionment, a more or less equivalent possibility of reduction is, however, achieved by virtue of the fact that a breach of the duty of disclosure or care in the event of a combination of causes can be allocated such a proportion of the loss as is indicated by the significance of the breach. A flexibility in the claims settlement is thereby achieved which may put less of a strain on the relationship between the insurer and the assured than a strict reduction based on an evaluation of fault.

The rule of apportionment shall apply in all cases where “the loss has been caused by a combination of different perils”. It shall therefore apply to both a combination of two or more objective causal factors and to a combination of objective causal factors and subjective fault. It shall also apply regardless of whether it is a combination of two independently acting causal factors which result in a casualty, or a combination of causes where a casualty is combined with a subsequent event and results in new damage, cf. ND 1977.38 NH VESTFOLD I. In this light, all the rules in the Plan aimed at negligence on the part of the person effecting the insurance or the assured are designed as strict causal rules and must be supplemented by the rule of apportionment contained in Cl. 2-13.

The most important situation from a practical point of view - a combination of marine and war perils - is, however, subject to separate regulation in Cl. 2-14.

The last area where it may be relevant to apply the rule of apportionment is when the casualty is caused by a combination of perils that have struck the interest during different insurance periods. This problem has been subject to in-depth discussions, and the solution follows from the special rules explained in the Commentary on Cl. 2-11.

On the basis of case-law concerning the rule of apportionment from 1930 up until today, legal theory has deduced a number of criteria for the application of this rule, see *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 262 *et seq.* These criteria are still relevant. This means, in the first place, that it is necessary to distinguish between relevant and non-relevant causes. The prerequisite for applying the rule of apportionment is that the loss has been “caused” by a combination of several perils. The fact that an effect of a peril has been a necessary condition for the loss is not sufficient to justify apportionment. If the effect of a peril has been rather insignificant, it should be assigned a weight of 0; in other words, Cl. 2-13 also opens the door for an apportionment where one effect of a peril is assigned a weight of 0 and the other a weight of 100. This applies both when there is a combination of two perils which cause a casualty, cf. for example ND 1942.360 VKS

KARMØY II, and where there is a combination of the casualty and a new peril which results in further losses, cf. ND 1977.38 NH VESTFOLD I. The lower limit required for an effect of a peril having a bearing on the apportionment may on a discretionary basis be set at 10-15%.

If it is clear that several perils must carry weight for the apportionment, it is more difficult to deduce criteria from current practice. In the event of *two objective concurrent causes* having led up to the casualty, it would presumably be correct to say that where there has been a combination of an earlier acting cause and a later direct cause of a loss, the most weight shall be attached to the latter cause. If the former cause shall carry any weight, it must have increased the probability of a subsequent loss. The greater the risk, the greater the importance to be attributed to the earlier cause.

If the loss is a result of a *combination of two objective causes in a causal chain* in the sense that a new cause interferes in the course of events after a casualty has occurred and results in a further loss, the first cause - i.e. the casualty - shall carry the most weight, cf. ND 1941.378 NV VESLEKARI and ND 1977.38 NH VESTFOLD I. Here the loss should be apportioned according to the degree of probability of the first casualty triggering the subsequent peril and consequently the new damage. The higher the degree of probability, the greater the weight to be attributed to the first peril.

In both of the combination situations referred to above, the loss may also have occurred through a combination of objective perils covered by the insurance and subjective negligence. As mentioned, the rule of apportionment may, in such cases, have a function similar to that of the reduction system in the event of subjective negligence under ICA. The objective of deterrence will be better served if it is possible to make some deduction from the compensation instead of having more rigid rules according to which the assured loses the entire cover in the event of any negligence on his part. In connection with minor acts of negligence, it would otherwise be tempting for the judge to reach the conclusion that “it has not been proved to his satisfaction” that the assured has shown negligence if the alternative is a loss of the entire cover. Here it would also be natural to base the apportionment on an evaluation of probability, and attach weight to the subjective negligence depending on the degree of probability that it would result in a loss. This will normally be concordant with an evaluation of the degree of fault: the higher the probability of a given action leading to a loss, the more serious the fault will normally be deemed to be. ND 1981.347 NV VALL SUN gives an example of a combination of dereliction of duty and other causal factors.

Sub-clause 2 was amended in the 2007 version, and must be seen in the context of the new exclusions in Cl. 2-8 (e) and Cl. 2-9, sub-clause 2 (b), cf. also the amendment to Cl. 2-12, sub-clause 3. The provision is concordant with the rules that formerly applied to the exclusion for nuclear perils, and prescribes that if an excluded peril related to nuclear risk and biological, etc. weapons has contributed to the loss, the entire loss shall be attributed to this peril. Thus there is no question of partial cover in accordance with the basic principle in sub-clause 1. This solution is in accordance with

the introduction to the RACE II Clause, which provides that any contribution by the excluded perils shall have the effect of exempting the insurer from liability.

## **Clause 2–14. Combination of marine and war perils**

This Clause is identical to Cl. 21 of the 1964 Plan.

The provision maintains the solution from the 1964 Plan with a modified dominant-cause rule for a combination of war and marine perils. The rule was introduced in connection with the revision in 1964 because the “free” rule of apportionment had resulted in a very high frequency of litigation between the war risk and marine insurers during World War II. As each case had to be assessed on its own merits, it was difficult to develop guiding rules through case law. Unlike during World War I, no typical cases crystallised which were attributable to the area of liability of either one insurer or the other. Instead, the outcome of each case became more or less uncertain because it was never possible to predict exactly the percentage of the loss that the court would allocate to war and marine perils, respectively. At the same time, the total losses, which amounted to approximately NOK 36.6 million, showed an almost equal distribution between the two groups of insurers. It was assumed that a more schematic rule of apportionment would, to a large extent, lead to the same economic result in a simpler and less expensive manner. During the revision, there was general agreement about this assessment, and the solution from 1964 has therefore been maintained.

The provision establishes that, in the event of a combination of war and marine perils, the dominant-cause rule shall in principle apply. This is expressed by the term that the whole loss shall be deemed to have been caused by the class of perils which was the “dominant cause”. If the application of this rule gives rise to doubt, in other words, if it is difficult to say that one of the classes of perils is “dominant”, the loss shall be divided equally.

As mentioned above under Cl. 2-13, when applying the dominant-cause rules, a distinction must normally be made between the situation where a casualty is the result of two independent concurrent causes and the situation where a casualty in combination with a new causal factor results in further loss or damage. While there will, in cases of two concurrent causes leading up to the time of the casualty, presumably be a weighing of the impact of the individual causes, where there has been a combination of a casualty and a subsequent cause in a causal chain, it will be deemed that the casualty is the dominant cause, provided that it has contributed to the subsequent damage. A corresponding distinction must be relied on when the “dominant cause” is to be identified under Cl. 2-14. However, in practice, the most frequent situation of combinations of war and marine perils is concurrent causes leading up to a loss. In such cases, a strictly objective evaluation must be made of which cause has had the greatest impact on the course of events. As regards a combination of the casualty and a subsequent

cause, an exception is furthermore made from the rule as regards an increase in costs of repairs, cf. below.

In the evaluation of the relationship between war perils and marine perils, due regard must be had to the fact that the insurances against marine and war perils are two equal types of insurance which every shipowner has, or will at any rate have the opportunity and reason to effect. There is therefore no reason to use the regard for the shipowner's need for security as an argument for considering the marine peril to be the "dominant cause" in a situation where the owner has not taken out any war-risk insurance and therefore has to cover damage resulting from war perils himself. The decision must, in other words, be made irrespective of the owner's actual insurance coverage.

Case law concerning tanker casualties in the Persian Gulf during the Iran-Iraq war shows that the dividing line between the first and second sentence of Cl. 2-14 may cause considerable problems, cf. arbitration award of 30 June 1987 and ND 1989.263 NV SCAN PARTNER. There is nevertheless reason to assume that in practice it is easier to draw this line than to apply a free discretionary rule of apportionment.

It is difficult to give general guidelines as to when to apply the first and second sentences respectively. The use of the term "dominant cause" shows, however, that a relatively considerable predominance is required in order to characterize a peril as the "dominant cause". It is not sufficient to reach the conclusion - perhaps under doubt - that one peril is slightly more dominant than the other; it is precisely the arbitrary choice between two causes which carry approximately the same weight that should be avoided. On the other hand, a 60/40 apportionment should probably constitute the upper limit for an equal distribution. If we get close to 66%, one of the groups of perils is after all considered twice as "heavy" as the other, cf. *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 269 *et seq.*, which also reviews a number of judgments from World War II in relation to these guidelines.

As mentioned above, an exception must, like the solution under the 1964 Plan, be made as regards the situation where there is a combination of several causes in a causal chain: as regards repair costs, only the perils that materialized before the casualty in question, and which have had a bearing on the physical damage sustained by the ship, shall be taken into consideration. By contrast, the increase in the cost of repairs caused by the war situation shall not be taken into consideration, regardless of whether the price increase was a fact at the time of the casualty or did not occur until later (cf. ND 1943.417 NV HAARFAGRE). Otherwise the war-risk insurer might be held liable to pay 50% of the repairs of a strictly marine casualty, provided that the increase in prices of repairs has been sufficient.

The rule of apportionment is also subject to another limitation in the relationship between war-risk and marine-risk insurance. As under the 1964 Plan, certain types of losses are allocated to the scope of

liability of the war-risk insurer, regardless of whether marine peril has been a contributory cause, cf. Cl. 2-15. In such cases, the marine peril will never be regarded as the dominant cause, nor will there ever be any question of an equal distribution. For further details, see below under Cl. 2-15.

### **Clause 2–15. Losses deemed to be caused entirely by war perils**

This Clause is identical to Cl. 22 of the 1964 Plan.

As mentioned above, the application of the modified dominant-cause rule in Cl. 2-14 will entail that the war peril must be deemed to be the dominant cause in all cases where the war peril must be accorded 60% weight or more in the course of events. In other cases, an equal distribution shall be made, unless the war peril has been so limited as to not carry any weight at all.

However, certain loss situations reflect war perils so strongly that they should be ascribed to the war-risk insurance, even if there was also a reasonably strong element of marine perils in the course of events. These situations are described in sub-clauses (a) - (c).

*Sub-clause (a)* establishes that the war peril shall be deemed to be the dominant cause when “the ship is damaged through the use of arms or other implements of war”, and this use is either motivated by war or takes place during military manoeuvres in peacetime. In most cases the perils mentioned here will be deemed to be the dominant cause already pursuant to Cl. 2-14. Nevertheless, the possibility cannot be ruled out that the marine peril may in such situations interfere in a manner that entails that it would be accorded more than 40% weight: for example, the ship suffers an engine breakdown and is carried by current and wind into a mine-field, the existence of which the crew is fully aware. The loss caused by the ship hitting a mine would, pursuant to Cl. 2-14, second sentence, have been divided on a 50/50 basis between the marine insurer and the war-risk insurer. However, under the current special rule, the war-risk insurer has to bear the entire loss.

The provision shall only apply if the use of the implement of war is the direct and immediate cause of the damage to the ship. In situations where the use of the implement of war takes place at an earlier stage of the course of events, while the direct cause is a marine peril, the question of liability must be resolved under Cl. 2-14. Another matter is that the use of implements of war may be deemed to be the dominant cause, even if it does not constitute the direct cause of the damage, for example, where the implement of war, an aircraft bomb, damages a dock gate so that the lock is emptied, something that in turn results in the assured ship running into another ship in the dock.

There may sometimes be some doubt as to what constitutes an “implement of war”, see, for example, ND 1946.225 NV ANNFIN (damage by collision with a submarine in action deemed to be “war damage” pursuant to the corresponding provision in Cl. 42 (2) of the 1930 Plan), ND 1944.33 NV

VESTRA (damage caused by the paravane on the warship with which the ship collided, not deemed to be “war damage”) and ND 1947.465 NV ROGALAND (damage resulting from the blowing up of explosives which another vessel was carrying to German fortifications, not deemed to be “war damage”). However, this question is of less significance today than under the 1930 Plan, because the dominant-cause rule is now the point of departure in case of a combination of marine and war perils.

If the implement of war leaves latent damage that is not discovered until a later insurance year, the actual damage must obviously be covered by the war-risk insurer during the year it occurred.

However, in relation to the further losses to which the latent damage gives rise, it must, under Cl. 2-11, be deemed to be an ordinary marine peril that strikes the ship in connection with the casualty.

Under *sub-clause (b)*, the war peril shall also be deemed to be the dominant cause when the loss is “attributable to the ship, in consequence of war or war-like conditions, having a foreign crew placed on board which, wholly or partly, deprives the master of free command of the ship”. The rule entails that the war-risk insurer bears full liability, provided that it is an established fact that the acts of the foreign crew have been a contributory cause to the damage. However, if the casualty is due entirely to marine causes, for example, heavy weather on a stretch of open sea which the ship would under any circumstances have had to pass through, the marine insurer will be liable.

The term “foreign crew” has been thoroughly reviewed in case law from World War II (see in particular ND 1943.452 NV RINGAR). In principle, the decision as to whether the foreign crew’s instructions and conduct may be deemed to “wholly or partly deprive the master of the free command” must be based on a case-by-case evaluation. If the ship, following orders from the relevant authorities, receives on board a mandatory pilot or a mine pilot in waters where the war peril manifests itself, the provision will not apply merely because the pilot is authorized to indicate the course of navigation. If the pilot makes a mistake with the result that the ship runs aground, the normal causation rules shall apply. The “foreign crew” must have been placed on board for the purpose of exercising control that goes beyond securing the navigation of the ship. The purpose may for example be to ensure that the ship puts into a control port, or prevent it from escaping to the enemy.

The application of sub-clause (b) is not subject to the condition that the foreign crew takes over the command of the navigation or manoeuvring of the ship. Other situations where the foreign crew interferes with the master’s activities and takes decisions in his place will also be covered by the provision, for example, where a foreign control officer issues orders concerning handling of the cargo and this leads to an explosion which causes damage to the ship.

*Sub-clause (c)* covers “loss of or damage to a life-boat caused by it having been swung out due to war perils”. Under the 1964 Plan, loss of or damage to life-boats while swung out was not compensated, unless this was caused by a war peril, cf. Clause 176 (j). This exception has been deleted because it is

not very practical for ships to sail with life-boats swung out in cases other than during a war situation. However, in such cases the marine peril will also normally contribute to the loss of the life-boat (it will be torn loose or damaged in heavy weather), and the situation might easily arise that the loss would have to be divided under Cl. 2-14. However, it would be reasonable to attribute these losses in their entirety to the war-risk insurer, in accordance with practice during World War II.

The provision in sub-clause (c) does not merely comprise loss of or damage to the life-boat itself, but also damage which the life-boat causes to the ship in general, for example, to davits and deck house. However, the rule does not apply to other losses which are more indirectly caused by the fact that the boat has been swung out, e.g., liability for damages in connection with a collision which, wholly or in part, is due to a life-boat having been swung out and reduced visibility from the bridge. However, in view of the circumstances, such loss may become the subject of an equal distribution pursuant to the rule in the preceding sub-clause.

If a life-boat which is swung out damages a crane or a warehouse when the ship is putting alongside a quay, liability to a third party will normally be borne by the marine insurer; the failure to have the life-boat brought back in again before putting alongside will constitute an error by the master or his crew in the performance of their duties as seamen.

## **Clause 2-16. Loss attributable either to marine or war perils**

This Clause is identical to Cl. 23 of the 1964 Plan.

Special problems arise when the casualty has occurred under such circumstances that it is uncertain whether it is attributable to marine or war perils. The 1964 Plan introduced a rule of apportionment which is maintained in the new Plan. If it is impossible to decide whether the casualty is attributable to war or marine perils, liability shall be divided equally between the two insurers.

As regards the term “the more probable cause”, this must be interpreted in the same way as the criterion “dominant cause” in Cl. 2-14. This means that a 0-100 distribution shall only take place in the event of a distinctly greater probability that one of the two categories of perils has been the cause of the loss. If there is more than 60% probability that one of the categories has caused the loss, this category shall be deemed to be the “more probable cause”, and there will be no division of liability, see in this respect ND 1989.263 NV SCAN PARTNER, where it was found that the marine peril (a gas explosion) was “the more probable cause”.

## Clause 2–17. Sanction limitation and exclusion

The Clause was new in 2016, corresponding to the Cefor Sanction Limitation and Exclusion Clause of 2014 that was already widely used in the market. Similar clauses are used in the international marine insurance and reinsurance market, cf. Lloyd's LMA 3100.

The purpose of this Clause is to protect the insurer by ensuring that he is not contractually required to perform activities that will expose him to sanctions. Where asset freezing restrictions apply, the insurer may not be able to, directly or indirectly, make payments to or for the benefit of, or receive payments from, the individual or entity designated under the sanction. Furthermore, under certain sanction regimes, including the EU sanctions applicable to Iranian and Syrian persons as defined under EU Council Regulations 267/2012 and 36/2012 and certain US sanction programmes, the provision of coverage itself is prohibited. In these situations, both providing cover and a payment from the insurer may expose the insurer to sanctions.

Sub-clause 1 regulates to what extent the insurer is exempt from liability due to sanctions.

The liability exemption does not only apply to payment of claims, but includes exemption from payment of any benefit under the insurance, for instance return of premium. The condition is that payment may expose that insurer or his reinsurers “to any sanction whether primary or secondary, prohibition or restriction”. By “primary sanction” is meant a sanction addressed to the companies and citizens in the State that impose the sanction to prevent them from doing business with a rogue regime, terrorist group or other international pariah. A “Secondary” sanction is a sanction that imposes additional economic restrictions designed to inhibit companies or citizens in another State from doing business with a target of a primary sanction. A secondary sanction therefore means that a Nordic insurer may be sanctioned by a foreign State in case of breach of such sanction.

The main categories of sanctions are asset freezing and trade sanctions. If the insured is subject to asset freezing restrictions, the cover as such may be valid, but transactions must not be carried out under the contract that would result in funds being made available to any insured or beneficiary.

Where trade sanctions (including arms embargos) apply, the provision of insurance coverage may be prohibited unless an appropriate licence is available or is obtained prior to the underwriting in question.

The limitation of liability does not apply to sanctions in general, but are limited to those “under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, the United Kingdom, the United States of America, France, the Russian Federation, the People's Republic of China or any State where the insurer has its registered office or permanent place of business”.

Sanctions imposed by other institutions or states not mentioned are not regulated by this sub-clause.

Sub-clause 2 gives the insurer a right to terminate the insurance if the subject-matter insured has engaged in activity that may expose the insurer to any sanction as regulated in sub-clause 1. This clause applies for instance if the insured vessel has carried cargo subject to export or import prohibitions, or if a MOU has provided services in prohibited areas, for instance Russia, cf. EU Council Regulation 960/2014.

## **Chapter 3**

### **Duties of the person effecting the insurance and of the assured**

#### **General remarks**

This Chapter deals with the effects of a breach by the person effecting the insurance or the assured of the duties imposed on them by the contract relation. These matters are also subject to detailed regulation in the relevant Nordic Insurance Contracts Acts (Nordic ICAs). The provisions of the Nordic ICAs have been amended substantially in relation to the previous Norwegian ICA dating from 1930, which formed the basis for the 1964 Plan. The amendments concern the criteria for the threshold for invoking/triggering sanctions and the criteria for the type of sanctions triggered/invoked. Generally it can be said that the amendments give greater protection to the person effecting the insurance and the assured in the event of breach of the duty of disclosure or the duty of care. The most important change is probably the one concerning the type of sanction, entailing a change from no liability at all to rules for discretionary reductions in a variety of situations.

The statutory provisions are not, however, mandatory for ships subject to registration which are used in commerce, cf. the relevant Nordic ICAs. One is, therefore, free to choose whether the Plan should be adapted to follow the provisions of the Nordic ICAs or not.

In principle, the approach during the revision has been that the Plan should follow the provisions of the relevant Nordic ICAs as far as possible. This is, however, not very satisfactory as regards the duty of disclosure and the duty of care. Even though they apply generally, the Nordic ICAs' provisions are aimed primarily at protecting consumers. In marine insurance, on the other hand, the person effecting the insurance is often a business enterprise; additionally, Norwegian shipowners have traditionally possessed considerable expertise in insurance matters. There is therefore not the same need for the type of extensive protection aimed at by the Nordic ICAs. Nor is the sanction structure in the Nordic ICAs, with its considerable emphasis on discretionary decision-making, entirely appropriate for a field like marine insurance. Given the considerable sums involved in marine insurance, allowing discretion to play such a large part could easily lead to significant growth in the number of lawsuits.

Although it was natural, as a starting proposition, to continue the approach of the 1964 Plan and the changes introduced by the conditions since then, there has been a need to achieve better co-ordination of the sanctions in the rules in this Chapter. Under the 1964 Plan, for example, the nature of the sanction to be applied depended upon which of the rules in Chapter 3 the fault of the shipowner could be categorised under. These differences have not always appeared to be well-founded. It has not, however, been possible to co-ordinate the sanctions completely. If an act of negligence by the assured can be subsumed under several provisions of the Plan at the same time, and the sanctions are different, the insurer will, in principle, be free to invoke the rule which gives him the most favourable result.

## Section 1

### Duty of disclosure of the person effecting the insurance

#### **Clause 3-1. Scope of the duty of disclosure**

The provision corresponds to Cl. 24 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs). The Commentary was amended in the 2010 version.

*Sub-clause 1* imposes on the assured a duty to disclose all information which is material to the insurer. Accordingly, the person effecting the insurance has an independent duty to take active steps to provide information; it is not enough for the person effecting the insurance to simply answer the questions asked by the insurer. The relevant Nordic ICAs, by contrast, have introduced a mere duty to respond as the basic rule and an active duty to provide information as the exception. In marine insurance, however, it is most appropriate to retain the Plan's approach with the active duty to disclose information. The person effecting the insurance is usually a professional and will, accordingly, have knowledge about what kind of information the insurer requires.

The approach of the 1964 Plan, namely that the scope of the duty of disclosure in Cl. 24 is to be determined using objective criteria, that is, irrespective of whether the person effecting the insurance knew of a certain fact or whether the person effecting the insurance ought to have realised that such fact would be of relevance to the insurer, has also been retained. Subjective knowledge is thus of no direct significance to the scope of the duty of disclosure, but is relevant to the nature of the sanction that the insurer may invoke in the event of breach of the duty of disclosure. The provisions of Cl. 3-2 and Cl. 3-3 which allow the insurer to limit his liability in the event of breach thus assume that the person effecting the insurance is in some way to blame for the breach of the duty of disclosure. The significance of having a duty of disclosure that is ascertained by objective criteria becomes evident in relation to the rules regarding the insurer's right to cancel the insurance contract, cf. Cl. 3-4. If the insurer has not received information material to him, the insurer is entitled to cancel the contract, even though the person effecting the insurance cannot be blamed for the fact that the information is incomplete. The Plan follows the relevant Nordic ICAs on this point. In practice, there has also been

discussion regarding the question of the duty of disclosure in relation to building contracts entered into by the shipowner if the contract contains an unusual waiver of claim for damages. The problem is related to Cl. 5-14 regarding the assured's waiver of a claim for damages against a third party.

However, it is uncertain whether this provision applies to an unusual waiver of the right to file a claim in accordance with the guarantee in a building contract, cf. the wording "in the trade in question". On the other hand, it is clear that if the person effecting the insurance enters into or takes over a building contract containing such an unusual waiver of liability, he has a duty to inform the insurer about this under Cl. 3-1.

When determining whether the insurer has received incomplete information, thus entitling him to cancel the insurance contract under Cl. 3-4, what the insurer in question maintains would have been material to him at the time the contract was concluded cannot be given decisive weight, as the insurer's view can have been influenced by subsequent developments. The deciding factor must be which information an insurer usually can and will demand prior to accepting an insurance risk of the type in question. The need for information will vary from one type of insurance to another, and it would not be feasible to provide a comprehensive enumeration. One particular situation which has been the subject of discussion in legal theory is the extent to which the person effecting the insurance should be obliged to disclose past criminal matters: see *Brækhus/Rein: Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), p. 123, and *Selmer: Lov, dom og bok* (Statute, Judgment and Book), p. 467 *et seq.*, in particular pp. 471-472.

If the insurance contract is entered into through a broker, it becomes the broker's task, as the agent of the person effecting the insurance, to diligently pass on all the information given by the person effecting the insurance. A mistake made by the broker which results in the insurer receiving erroneous or incomplete information would be the risk/at the peril of the person effecting the insurance.

Similarly, if the person effecting the insurance is in good faith, but the broker knows that the information from the person effecting the insurance is incomplete or incorrect, a failure by the broker to correct the information would be the risk/at the peril of the person effecting the insurance.

This means that the broker has an independent duty *vis-à-vis* the insurer to correct or supplement the information given by the person effecting the insurance. If the broker negligently breaches this duty, the insurer may invoke Cl. 3-3 against the person effecting the insurance.

The duty of disclosure applies "at the time the contract is concluded". Subsequent changes must be assessed according to the rules concerning alteration of risk, cf. Cl. 3-8 *et seq.* The difference is illustrated in the case ND 1978.31 Sandefjord ORMLUND, where a Norwegian second engineer with a dispensation to sail as a chief engineer was, after the insurance contract was entered into, replaced by another Norwegian who did not have a valid certificate or any type of dispensation. The court treated the change as an issue of breach of the duty of disclosure; the correct approach must, however, be to

treat it as an alteration of the risk: see *Bull: Sjøforsikringsrett* (Marine Insurance Law), pp. 103-104, and *Brækhus/Rein: Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), pp. 120-121.

On the other hand, the person effecting the insurance will also have a duty of disclosure when the contract is being renewed. The insurer can, however, be expected to retain the information given earlier, so there can be no new duty of disclosure as regards information that was previously conveyed. On the other hand, the person effecting the insurance must give information relating to any new matters, e.g. changes in the nationality of the crew or in the ship's trading areas.

The information is to be given to "the insurer". This includes both the leading insurer and the individual co-insurers. In principle, the person effecting the insurance is entering into separate agreements with each individual co-insurer, and the consequence must therefore be that all of them may invoke any breach of the duty of disclosure. As a result, it is the responsibility of the person effecting the insurance to ensure that all co-insurers receive correct information. If, however, the leading insurer makes independent inquiries about the person effecting the insurance and obtains incorrect information which is then passed on to the other insurers, this will not be the risk of/at the peril of the person effecting the insurance. This does not, however, apply if the person effecting the insurance knows that the insurer is relying on incorrect, material information.

*Sub-clause 2* corresponds to the relevant Nordic ICAs, and has been somewhat reformulated from the previous wording to concord with the Nordic ICAs. The rule will apply in situations where, e.g., the person effecting the insurance becomes aware, during the insurance period, that the vessel is considerably older than what was stated at the time the insurance contract was concluded. The duty to correct information will, however, only apply to circumstances which existed at the time the contract was entered into. Circumstances arising later must be assessed according to the rules on alteration of the risk.

When the person effecting the insurance subsequently corrects the information about the risk, this may entitle the insurer to cancel the insurance contract pursuant to Cl. 3-4. If the person effecting the insurance later becomes aware of certain facts and fails to report them, the insurer's liability will be limited according to Cl. 3-3, sub-clause 2, second sentence.

### **Clause 3-2. Fraudulent misrepresentation**

This Clause corresponds to Cl. 25 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The provision governs fraudulent misrepresentation. The corresponding rule in Cl. 25 of the 1964 Plan applied to both fraudulent and negligent misrepresentation. The relevant Nordic ICAs apply only to

fraudulent misrepresentation, while negligent misrepresentation is covered by that part of the same provision which pertains to negligent breach of the duty of disclosure. The Plan follows the Nordic ICAs approach on this point. In keeping with the relevant Nordic ICAs, however, a rule on cancellation in the event of fraudulent misrepresentation has been introduced which is more onerous on the person effecting the insurance than the current rule.

The consequence of fraudulent misrepresentation on the part of the person effecting the insurance is that the contract is not binding. This is in accordance with general principles concerning voidable contracts. At the same time, it is important that the insurer reacts in such a way that the person effecting the insurance is informed unequivocally that there is no insurance coverage. The insurer's duty to give notice pursuant to Cl. 3-6 of the Plan has therefore been expanded and, in the event of his failure to give notice, cover will continue, cf. below. The relevant Nordic ICAs have opted for a somewhat different wording, but the result is, in practice, largely the same.

It does not matter, for the purposes of Cl. 3-2 of the Plan, what significance the information in question would have had for the insurer's acceptance of the risk. The issue of whether it is reasonable that incomplete or incorrect information about a factor of lesser importance should void the contract was considered, see *Brækhus/Rein: Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), p. 125. The relevant Nordic ICAs, for their part, do not take into account what the fraudulent misrepresentation was about. Since the contract does not become void in the event of negligent misrepresentation, the need for a differentiated sanction structure is reduced, and the absolute sanction has therefore been maintained.

*Sub-clause 2* is new, and gives the insurer the right, where there has been fraudulent misrepresentation, to cancel other contracts with the person effecting the insurance on giving 14 days' notice. The provision corresponds to the relevant Nordic ICAs, except that under the Nordic ICAs the insurer may cancel with immediate effect. The Committee found it appropriate to follow the Nordic ICAs in allowing the insurer to cut all ties with a client who has acted fraudulently. The period of notice in the Nordic ICAs is, however, too short for marine insurance relations, and so has been set at 14 days, in keeping with other notice periods in the Plan.

### **Clause 3–3. Other failure to fulfil the duty of disclosure**

This Clause corresponds to Cl. 26 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

Both the threshold for invoking/triggering sanctions and the criteria for the type of sanctions triggered/invoked in the Nordic ICAs differ from the Plan's provision regarding other breaches of the duty of disclosure; the sanction threshold is higher in the Nordic ICAs and the sanction structure is

more differentiated. There is no reason, however, to raise the sanction threshold to "more than just a little blame attaching" in marine insurance. Moreover, in marine insurance, the basic principle for the sanction threshold in the event of misleading information should be that the insurer be put in the same position as he would have been in had he been given correct information. A discretionary reduction in compensation of the kind found in the Nordic ICAs is therefore not recommendable in marine insurance.

*Sub-clause 1* applies when the person effecting the insurance has "in any other way failed to fulfil his duty of disclosure", i.e. there has been culpable conduct which cannot be characterised as fraudulent. Under the amendment to Cl. 3-2, the provision will encompass any case of negligent breach of the duty of disclosure, viz. from situations of ordinary negligence to situations of gross negligence qualifying as unfair conduct.

If the insurer would not have accepted the risk if the person effecting the insurance had provided the information which should have been given, the contract is "not binding". Under the 1964 Plan, the sanction was that the insurer was "free from liability". The amendment corresponds to the approach adopted for fraudulent misrepresentation, cf. Cl. 3-2 of the Plan. The reality in both cases is that the insurer is not liable to pay when an insurance event has occurred, and it is therefore better to be consistent as regards the wording used. Moreover, the wording "not binding" seems more consistent with the rules concerning the insurer's right to cancel and duty to give notice. Under Cl. 29 of the 1964 Plan the insurer was required to give notice of his intention to invoke Cl. 26, first sub-clause, but it was not clear if the insurer had to cancel the contract to be free from liability for future losses. The wording to the effect that the contract is not binding makes it perfectly clear that there is no need to cancel, while at the same time Cl. 3-6 of the Plan requires the insurer to give notice of his intention to deny coverage.

Since the contract is not binding if the insurer would not have entered into it if correct information had been given, the insurer is put in the same position as he would have been in had correct information originally been given. The insurer has the burden of proving that he would in no way have entered into any contract, but it is sufficient for him to demonstrate, on a balance of probabilities, that he would not have accepted the risk; what other insurers might be expected to have done is irrelevant.

If the insurer would have accepted the risk, but on different terms, then *sub-clause 2* allows the insurer to avoid liability where there is a causal connection between the casualty and the matter that should have been disclosed. The word "terms" refers to both the contract with the person effecting the insurance and any other arrangements the insurer would have made with full knowledge of the facts. If the insurer would have taken out higher reinsurance, for example, the insurer will not be liable if the casualty is due to a circumstance about which he was not informed. If it is clear that the person effecting the insurance has acted negligently, either at the time the contract was concluded or

subsequently, the person effecting the insurance will have the burden of proving that the undisclosed risk factor was not material to the casualty, or that it occurred before he was in a position to correct the information supplied.

It could be said that the Plan's sanction structure is not sufficiently differentiated for situations in which an insurer with correct information would have, for example, introduced a safety provision or charged a higher premium. An absolute exemption from liability for the insurer in such cases could seem unreasonable. However, since the rules on the duty of disclosure are not frequently used in practice, it appears unnecessarily complicated to introduce a new sanction structure.

If the casualty is due to a combination of risk factors about which the insurer knew, and factors about which the person effecting the insurance has failed to give information, liability must be limited according to the general rule on apportionment in Cl. 2-13. The apportionment rule opens the door to attaining results close to those which would have been obtained under the rule regarding discretionary reduction of compensation in the relevant Nordic ICAs, whereby the indemnity is reduced depending on how much the undisclosed factors have influenced the course of events.

Even though the insurer is protected by the principle of causation, he may have an interest in being released from the insurance relationship, among other things, because the evidence for the cause of a casualty may be unclear. Under *sub-clause 3*, the insurer may therefore cancel the insurance contract by giving 14 days' notice. As elsewhere in the Plan, "notice" here refers to the period of notice for cancellation. Also as elsewhere, the notice period referred to here starts to run from the time the person effecting the insurance has received the notice.

#### **Clause 3–4. Innocent breach of the duty of disclosure**

This Clause is identical to Cl. 27 of the 1964 Plan and corresponds to the relevant Nordic Insurance Contracts Acts.

If information about the risk is incorrect or incomplete, and the person effecting the insurance is not to blame for this, the insurer is liable according to the terms of the contract, but may cancel the insurance contract by giving 14 days' notice. Under Cl. 117, sub-clause 1 of the 1964 Plan, the insurer could, in these situations, also charge an additional premium for the period during which he had borne the risk. This provision was of no practical significance, and has therefore been deleted. Moreover, according to general principles of contract law, the insurer in this type of situation is entitled to an additional premium corresponding to the additional risk which must be borne when the risk is different from what is assumed in the contract.

The question of when information must be considered incomplete is discussed above under Cl. 3-1, where the relationship between Cl. 3-1 and Cl. 3-4 is also discussed.

### **Clause 3–5. Cases where the insurer may not invoke breach of the duty of disclosure**

This Clause corresponds to Cl. 28 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The *first sentence* states that the insurer loses the right to invoke incorrect or incomplete information if he knew or ought to have known the true facts at the time the contract was entered into. The wording "ought to have known" is new, and is taken from the Norwegian ICA Section 4-4, first sentence. This approach also fits in well with the rules of the Plan: when Cl. 3-1 imposes a strict duty of disclosure on the person effecting the insurance, it is natural that Cl. 3-5 should impose on the insurer a duty to show due diligence with respect to the information he has received. Therefore, if the person effecting the insurance gives certain information about which the insurer might wish to have greater detail, then he must request it.

The rule also applies in the event of fraudulent misrepresentation. There is little reason to give the insurer the opportunity to speculate at the expense of the person effecting the insurance if the insurer, at the time the contract is concluded, knows that the person effecting the insurance is fraudulently giving incorrect information, but nonetheless accepts the risk.

As regards the point in time that is relevant when considering the insurer's knowledge, there are minor differences in the rules: the relevant point in time in Nordic ICAs is when the insurer receives the erroneous information, while the Plan refers to the time when the information should have been given. The Plan thus allows the person effecting the insurance to invoke the knowledge of the insurer right up to the time when the person effecting the insurance should have corrected the information pursuant to Cl. 3-1, sub-clause 2.

Under the *second sentence*, the insurer may not invoke incomplete information about facts which are no longer material to him, unless there has been fraudulent misrepresentation. This is in accordance with the approach of the 1964 Plan, while the Norwegian ICA Section 4-4 does not allow the insurer to invoke this type of fact, even in the event of fraudulent misrepresentation. However, once the insurer has become aware of such fraudulent misrepresentation on the part of the person effecting the insurance, he should react within a reasonable time, so that the person effecting the insurance may take out new insurance. A different approach might also give the insurer the possibility of keeping the question open so as to see what is most advantageous to him, cf. the comments on the first sentence of the Clause.

**Clause 3-6. Duty of the insurer to give notice**

This Clause corresponds to Cl. 29 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The provision imposes on the insurer an obligation to inform the person effecting the insurance if he intends to invoke a breach of the duty of disclosure. In the corresponding provision in the 1964 Plan, the insurer had no duty to give notice in the event of fraudulent misrepresentation. However, the Norwegian ICA Section 4-14 imposes a duty to give notice even in the event of fraudulent misrepresentation, and a corresponding rule has been introduced in the Plan.

Under the 1964 Plan, the insurer's duty to notify was not subject to any specific requirements as to form. The Nordic ICAs requires the notice to be in writing, and this requirement has been included in the new Plan.

**Clause 3-7. Right of the insurer to obtain particulars from the vessel's classification society, etc.**

The provision corresponds to Cl. 30 of the 1964 Plan and Cefor I.19 and PIC Cl. 5, no. 4.

In shipowners' insurance, the information held by the vessel's classification society will be of crucial importance. This is true at the time the contract is concluded and also during the period of insurance, e.g., if the insurer is considering exercising its right to cancel the contract pursuant to Clause 3-27.

*Sub-clause 1* imposes on the person effecting the insurance a duty to obtain for the insurer all information which the classification society may at any time have regarding the condition of the ship. The duty to obtain information assumes that the insurer has requested it. In practice, this duty will usually be fulfilled by the shipowner giving the insurer written permission to obtain the information, to the extent that the classification society requires such prior permission. The Plan cannot, of course, require the classification society to release information which it otherwise could withhold; this is indicated by the requirement that the particulars must be "available".

Refusal by the shipowner to assist the insurer in obtaining the particulars he wants from the classification society will constitute a material breach of the insurance contract. Such breach would presumably allow the insurer to cancel the contract even without an express provision, but to avoid any uncertainty in that respect the right to cancel the contract has been explicitly set out in *sub-clause 2*. The notice period is 14 days, but the insurance does not in any event lapse until the ship has reached the closest safe port according to the insurer's instructions. "Port" is understood to mean the closest geographical place of call, not the destination of the ship. If the assured does not agree with the insurer's

instructions regarding a safe port, it must be decided, based on an objective assessment, whether the port is safe for the ship in question.

If the insurer wishes to obtain information from the classification society in connection with settlement of a claim following a casualty, in order, e.g., to support an assertion that that he had not received complete information concerning the risk or that the assured knew the ship was not seaworthy, Cl. 5-1, sub-clause 2, will apply.

*Sub-clause 3* is new, and gives the insurer authority to obtain particulars referred to in sub-clause 1 directly from the classification society and from relevant government authorities in the country where the ship is registered or has undergone Port-State control. The provision is taken from the insurance conditions, cf. Cefor I.19 and PIC Cl. 5, no. 4. It has been reformulated somewhat, but the substantive content is largely the same. The person effecting the insurance is to be informed no later than when the particulars are obtained.

Sub-clauses 1 and 2 may appear superfluous when sub-clause 3 allows the insurer to go straight to the classification society. This is correct insofar as the classification society accepts the rule in the third sub-clause. But because one cannot be sure that this will always be the case, there is still a need for the rules in sub-clauses 1 and 2 as a supplement to sub-clause 3.

## Section 2

### Alteration of the risk

The Commentary was amended in the 2010 version. This Section corresponds to Clauses 31-44 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs). The provisions of the Nordic ICAs only deal with the general rules relating to change of risk while this Section deals with general rules as well as special rules concerning change of class, breach of trading areas and rules of a similar nature such as Cl. 3-16 on illegal activities, Cl. 3-17 and Cl. 3-18 concerning the effect of requisition, Cl. 3-20 on removal of a damaged vessel and Cl. 3-21 on change of ownership. Cl. 43 of the 1964 Plan also contained rules which gave the insurer the right to limit his liability in the event of the ship being moved to a different location to avoid condemnation. This rule is superfluous now that the claims leader has been given authority to decide the issue of moving the ship on behalf of the whole group of insurers, cf. Cl. 9-4.

The relevant Nordic ICAs provisions on alteration of the risk give the insurer the right to limit liability in the event of alteration of the risk or changes in circumstances which are material to the calculation of the premium. The relevant sanctions are total or partial exemption from liability, or a proportionate reduction in liability. For the insurer to be able to invoke these sanctions, however, the requirements of

fault and causation must be met. These provisions from the Nordic ICAs are not, however, all suited for application to marine insurance, however. Accordingly, the relevant rules from the 1964 Plan have been for the most part retained.

The general rules on the effect of alteration of the risk are found in Cl. 3-8 to Cl. 3-13. Presumably these rules will not frequently be invoked as the practical instances of alteration of the risk are dealt with by specific provisions. Moreover, the rules on safety regulations in Chapter 3, Section 3 encompass a number of cases which otherwise would have been decided according to the general rules on alteration of the risk.

The rules in this and succeeding sections are aimed at the assured and link legal consequences to his actions or omissions. The assured is the party who is entitled to an indemnity or the amount insured, cf. Cl. 1-1 (c) of the Plan, i.e. the party who owns the financial interest which has been affected by the casualty. A single casualty can give rise to indemnity claims from several assureds under a single insurance contract, e.g., where the ship is co-owned. The main principle in such situations is that each assured shall be judged separately. Fault on the part of one will not affect the others, although exceptions can be envisaged. On the other hand, it is not necessary for the assured to have personally been at fault for the rules to apply, however. To some extent the assured must be held vicariously liable for the acts or omissions of those persons acting on his behalf. This type of issue, such as whether the act or omission of an assured may affect the legal position of another, or whether the assured may be held vicariously liable for the acts or omissions of his employees, servants or agents, are dealt with under one heading in Chapter 3, Section 6.

### **Clause 3-8. Alteration of the risk**

Sub-clause 2, second sentence, was added in the 2007 version. Sub-clause 2 was amended in the 2003 version. The provision is otherwise identical to earlier versions of the 1996 Plan and corresponds to Cl. 31 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The general rules on alteration of the risk correspond to the relevant Nordic ICAs, but the definitions of alteration of the risk, the threshold/criteria for triggering sanctions and the sanction structure are all different. As mentioned earlier, the issue of harmonisation with Nordic ICAs provisions has been examined, but it was decided that it was most suitable to retain the rules of the Plan.

An insurance contract is one under which an insurer is to bear the risk of specified perils to which the insured interest is exposed. If one of these perils increases in intensity, this will not constitute an alteration of the risk which the insurer can then invoke. Thus, Cl. 3-11 does not require the assured to notify the insurer if the ship runs into extremely bad weather or ice-filled waters.

Accordingly, it is necessary to distinguish between alterations of the risk having the effect of terminating the insurance contract by frustration of the contract, and alterations which are not of such character. *Sub-clause 1* sets out two general conditions which must be met: there must have been a change of a fortuitous nature, and the change must amount to frustration of the fundamental expectations upon which the contract was based. For both aspects, the decisive factor will be the construction of the insurance contract in question. The issue becomes one of whether the insurer should be bound to maintain the cover without an additional premium in the new situation which has arisen, or whether it would be reasonable to give the insurer the opportunity to apply the sanctions provided in the Plan. On this point it largely becomes necessary to fall back on basic principles of insurance and contract law; exhaustive exemplification is not possible.

Like the relevant Nordic ICAs, the Plan uses the wording "alteration of the risk" and not "increase of the risk". This expression was chosen out of consideration for situations where a change in the risk can clearly be ascertained due to evolving external circumstances, but it is difficult to determine whether the risk has in fact become demonstrably greater.

Cl. 31, sub-clause 2 of the 1964 Plan contained a rule on loss of class as an alteration of the risk. On the other hand, the additional insurance conditions dealt with loss of class and change of class under separate rules, cf. Cefor I.23, and PIC Cl. 5.5. During the revision, the view was taken that the general rules on alteration of the risk did not provide a suitable regulatory framework for dealing with classification problems. Accordingly, the issue was made subject to specific regulation in Cl. 3-14 of the 1996 Plan. In the 2007 revision, however, change of class was removed from the specific regulation in Cl. 3-14 and moved back to the rules regarding alteration of the risk, cf. below.

*Sub-clause 2* provides that a change of the State of registration, the manager of the ship or the company which is responsible for the technical/maritime operation of the ship shall be deemed to be an alteration of the risk as defined by sub-clause 1. This provision was amended in 2003 through the addition of "a change of the State of registration". The addition corresponds with the English ITCH rules, as well as with a number of continental conditions. The remainder of the provision tallies with the 2002 version and has been taken from the additional insurance conditions, cf. Cefor I.22 and PIC Cl. 5.13, which dealt with change of operating company as well as change of ownership and transfer of shares. However, the special rules regarding changes in the ownership structure of the company have been deleted as they were considered unnecessary. A transfer of shares in the owner company will not in itself be significant for the insurers – the decisive factor is whether there is a change in the company or companies responsible for operating the ship. On the other hand, the rule regarding change of operating company has been retained here, while the rule regarding change of ownership has been moved to Cl. 3-21 and is further commented on under that Clause.

The provision is based on a presumption that a change of the State of registration, manager or operating company will be of significance to the insurer. On the other hand, automatic termination of the cover, which is the solution in many other countries, will be an unnecessarily severe sanction. A milder approach is obtained by explicitly classifying a change of the State of registration, the manager or the company responsible for the technical/maritime operation of the ship as an alteration of the risk. The assured must notify the insurer of this type of change pursuant to Cl. 3-11, and the insurer has the right to terminate the contract regardless of whether notification is given, cf. Cl. 3-10. If an insurance event occurs, the insurer will be free from liability if it can be assumed that the insurer would not have accepted the risk had he known that the change would take place, cf. Cl. 3-9, sub-clause 1. If it can be assumed that the insurer would have accepted the risk but on other conditions, the insurer will only be liable to the extent it is established that the loss is not due to the alteration of the risk, cf. Cl. 3-9, sub-clause 2. This type of sanction structure gives the insurer sufficient protection against this kind of change.

The term "State of registration" refers to the State in which the ship is registered. It makes no difference if the ship is registered in another register in the same State, such as in the case of a change from NOR to NIS. The expression "manager" has a long tradition in marine insurance law, and covers the company which has the overall responsibility for the ship's technical/maritime and commercial operation. A change of manager will thus entail a change in all management functions, i.e. technical, maritime and commercial management. The term "manager", by contrast, does not encompass a company which is only responsible for part of the ship's operation. If the management functions are separated, it will be crucial for the purposes of insurance which company is responsible for the "technical/maritime" operation. Responsibility for the technical/maritime management functions will usually be combined in one company, and the functions must be combined in this way for the change to automatically constitute an alteration of the risk pursuant to Cl. 3-8, sub-clause 2: if the technical and maritime functions are split up among two or more companies, a change of one of these companies will not automatically constitute an alteration of the risk but may, depending on the circumstances, constitute a general alteration of the risk under Cl. 3-8, sub-clause 1. The same applies if there is a change of the company which is only responsible for the commercial operation of the ship, or for the crewing of the ship. As the threshold for a relevant change under sub-clause 1 is high, an insurer wishing to protect his position where there is a change of the company responsible for functions other than technical/maritime operation must include a specific clause to that effect.

Sub-clause 2, *second sentence*, was new in the 2007 version. According to Cl. 3-14, sub-clause 2, of the 1996 Plan, the rule was that the insurance terminated in the event of a change of classification society unless the insurer explicitly consented to a continuation of the insurance. As a result of this rule, the shipowner's simply forgetting to give notification of such a change could result in the termination of the insurance, even if the insurer might well have approved continuation of the insurance had he been notified of the change of classification society. It is therefore more suitable to

apply the general rules governing alteration of the risk in respect of this point. As a result of the amendment, the rules stating that insurance cover does not terminate until the ship has reached its next port no longer applies in relation to a change of classification society. Thus, if the insurer would not have approved the change, he is not liable for casualties that occur after the change took place, cf. Cl. 3-19, sub-clause 1.

### **Clause 3–9. Alteration of the risk caused or agreed to by the assured**

This Clause is identical to Cl. 32 of the 1964 Plan.

Reference is made to the Commentary on Cl. 3-3 with respect to the burden of proof and combination of causes.

### **Clause 3–10. Right of the insurer to cancel the insurance**

This Clause is identical to Cl. 33 of the 1964 Plan.

The rule corresponds to the relevant Nordic Insurance Contracts Acts (Nordic ICAs), although the Nordic ICAs contains the additional requirement that the cancellation be reasonable. The Nordic ICAs also contains rules on how the cancellation is to be carried out. These rules are superfluous in marine insurance.

### **Clause 3–11. Duty of the assured to give notice**

This Clause corresponds to Cl. 34 of the 1964 Plan.

The *first sentence* imposes on the assured a duty to inform the insurer in the event of an alteration of the risk. The *second sentence* allows the insurer, in the event of a failure to notify, to cancel the contract or take other action. The period of notice has been changed to 14 days, in keeping with the rules for the duty of disclosure.

The relevant Nordic ICAs contain a rule to the effect that the rules on alteration of the risk may not be invoked if the assured has taken reasonable steps to notify the insurer as soon as the assured knew about the change. This provision is not entirely suitable within the Plan system.

### **Clause 3–12. Cases where the insurer may not invoke alteration of the risk**

This Clause is identical to Cl. 35 of the 1964 Plan.

*Sub-clause 1* sets out the same rule for alteration of the risk as that in Cl. 3-5, second sentence, regarding the duty of disclosure. However, it is only the rights referred to in Cl. 3-9 and Cl. 3-10

which are lost by the insurer once circumstances have returned to normal, and not the right under Cl. 3-11. The duty to give notice of relevant alterations of the risk is so important from the insurer's standpoint that an assured who has neglected this duty must be prepared to face cancellation on 14 days' notice, even if the contractual level of risk has been restored.

*Sub-clause 2* prohibits the insurer from invoking an alteration of the risk caused by measures taken to save human life. This provision corresponds to the similar provision in the relevant Nordic Insurance Contracts Acts (Nordic ICAs). However, the rules are somewhat different when there is an alteration of the risk due to measures taken to salvage goods of material value: under the Plan, the insurer must accept an alteration of the risk occurring for the purpose of saving a ship or goods "during the voyage", while the rule in Nordic ICAs applies generally without any similar restriction to salvaging of goods. Unrestricted allowance of the ship to be used in salvage operations at the expense of the insurer is not appropriate in marine insurance. Coverage of the alteration of the risk in salvage operations to save goods must be limited to the occasional salvage operation decided upon more or less spontaneously, and which it is natural for a commercial vessel to undertake. This limitation is expressed in the requirement that the salvage operation must take place "during the voyage". The salvage operation takes place "during the voyage" when the vessel in distress is located in the immediate vicinity of the sailing route. However, the formulation also encompasses the situation where the ship departs from a port of call in order to assist a vessel in distress, if the casualty has occurred in the proximity of the port and the insured ship is the closest vessel available to assist the vessel in distress, cf. ND 1966.200 Lyngen NINNI.

It does not matter, for the purposes of insurance cover, whether the assured has consented to the salvage operation or not. A requirement of consent on the part of the assured might make the master hesitate to report a salvage operation which he finds appropriate and correct to carry out. Therefore, as long as the salvage operation takes place "during the voyage", it is permitted.

Salvage operations will often involve the insured ship being used for towing. This would normally affect the liability coverage under the hull insurance contract but, under Cl. 13-1, sub-clause 2, sub-sub-clause (a), the coverage will remain in force when the salvage operation is permitted pursuant to Cl. 3-12, sub-clause 2.

If the salvage operation is not permitted, the insurer may invoke Cl. 3-9 and Cl. 3-10. Cancellation by giving 14 days' notice is, however, not very practical in this kind of situation. Consequently, the insurer's main protection will come from Cl. 3-9: if the insurer would not have accepted the risk, the entire contract ceases, besides which the insurer is free from all liability arising from the salvage attempt. On the other hand, accidental damage occurring completely independently of the salvage operation will still be covered. The alternative would have been to suspend the insurance cover while the salvage operation was being carried out, but this would have been too stringent.

A salvage operation which the assured opts to carry out contrary to Cl. 3-12, sub-clause 2, will constitute an alteration of the risk which he will have a duty to notify Cl. 3-11. If the assured neglects this duty, the insurer may use that neglect as a basis for cancelling the insurance contract, even though the salvage operation is completed without damage to the ship, cf. the comments above on sub-clause 1.

In determining the salvage reward, consideration shall also be given to damage and loss sustained by the salvor, cf. Norwegian Maritime Code (*Sjøloven*) Section 442, no. 1 (f), and under Section 446, first sub-clause, damage sustained by the salvor shall receive first priority when the salvage reward is distributed. Insofar as the salvage reward is sufficient to cover the assured's loss, the insurer should be indemnified, cf. Cl. 5-18 which applies *mutatis mutandis* to the rules on claims against third parties.

### **Clause 3–13. Duty of the insurer to give notice**

This Clause corresponds to Cl. 36 of the 1964 Plan and has a parallel in the relevant Nordic Insurance Contracts Acts.

The provision is identical to the one regarding the duty to notify in Cl. 3-6 above.

### **Clause 3–14. Loss of the main class**

In the 2013 Plan it has been expressly stated what previously was implied in the text and the Commentary that Cl. 3-14 only apply to loss of the main class. The provision is otherwise identical to earlier versions of the 1996 Plan.

In addition to the main class the vessel with its equipment may be given optional additional class notations according to the individual classification society's rules. Unless the insurer expressly has made Cl. 3-14 applicable also for any such additional class notations, loss of same will not result in an automatic termination of the insurance cover.

*Sub-clause 1* sets out the principle that, at the time the insurance cover commences, the ship shall be classed with a classification society approved by the insurer.

In earlier versions of the 1996 Plan, the rule under sub-clause 1 was that both loss of class and change of classification society led to automatic termination of the insurance. In the 2007 version, this was amended to the effect that only loss of class causes the insurance to terminate, sub-clause 2, *first sentence*. A change of classification society was made an alteration of the risk, cf. Cl. 3-8, sub-clause 2. The rule that the insurance cover will not terminate if the insurer expressly consents to continuation of the insurance therefore only applies in relation to loss of main class. The provision ensures that the

assured may not argue that he has informed the insurer, who has then given tacit acceptance. Furthermore, cover is maintained in any event until the ship reaches the nearest port, sub-clause 2, *second sentence*. In keeping with the formulation of Cl. 3-7, sub-clause 2, the closest safe port as instructed by the insurer is specified, cf. also the Commentary on Cl. 3-7. *Sub-clause 3* sets out what is to be deemed a loss of the main class. Because some classification societies cancel the ship's main class when a casualty has occurred, it is explicitly stated that suspension or loss of main class resulting from a "casualty which has occurred" is not to be deemed a loss of main class. In this situation the assured should not be deprived of cover. It does not matter in this connection whether the casualty is recoverable under the insurance or not. The insurance remains intact, even if the main class is suspended following a casualty which is not recoverable, e.g., because the ship was not complying with the required technical standard. The insurer may, of course, invoke any of the defences pursuant to Chapter 3 if applicable.

There is no requirement for cessation of the insurance that the loss of main class results from a formal decision by the classification society. The trend among classification societies is to introduce rules on automatic suspension of class when the assured has failed to carry out one of the three periodic surveys: Renewal Survey (every five years), Intermediate Survey (every second or third year) and the Annual Survey. The main class can thus be suspended without a formal decision on the part of the administration in the classification society.

### **Clause 3-15. Trading areas**

The Clause was amended in 2016, due to a disagreement that had arisen on the effect of the requirement for compliance with ice class rules introduced in 2007. Hence, Cl. 3-22, sub-clause 3, was deleted in 2016.

The rules are still based on a tripartite division: ordinary trading areas, excluded trading areas (areas where there is no cover unless express prior approval has been given), and conditional trading areas (areas where the shipowner may trade but on certain conditions such as e.g. additional premium). *Sub-clause 1, first sentence* defines the ordinary trading areas, as comprising all waters except those which are defined as excluded or conditional areas. The excluded or conditional trading areas are defined in the Appendix to the Plan. *Sub-clause 1, second sentence*, provides that the person effecting the insurance has a duty to notify the insurer in advance whenever the ship sails outside of the ordinary trading area. Cl. 3-15 is intended to be exhaustive as regards the consequences of sailing outside the trading areas, in the sense that the general rules regarding alteration of the risk in Clauses 3-8 to 3-13 do not apply to this particular type of alteration of the risk. But other general rules may apply as explained further below.

*Sub-clause 2* provides that the insurer may as before give his consent to trade outside the ordinary trading area subject to payment of an additional premium and other conditions. The insurer may e.g. provide cover subject to an increased deductible for any damage occurring outside the ordinary trading area. If the insurer should make his consent subject to compliance with other conditions aiming to prevent a loss, such conditions shall constitute safety regulations, cf. Cl. 3-22 and Cl. 3-25, sub-clause 1. The insurer may make such safety regulations special safety regulations, cf. Cl. 3-22 and Cl. 3-25, sub-clause 2. If the assured has failed to notify the insurer pursuant to sub-clause 1 of trade outside the trading area, the insurer cannot retroactively impose a safety regulation unless such safety regulation is in conformity with the insurer's normal practice for the trade in question.

The classification societies that are members of the International Association of Classification Societies (IACS) have not agreed on any common ice class notations, and ice class is not a part of the main class. Ice class is currently a voluntary additional class notation, documenting that the vessel is designed to operate in certain ice conditions. The higher the ice class, the thicker ice the vessel is designed to operate in. The classification societies' rules as such do not regulate the way in which a vessel may be operated in ice-infested waters. The vessel's class will not be lost or suspended if the vessel operates in ice conditions that it is not designed for. Even so, information about whether the vessel has any ice class, and if so which one, is of importance for the insurer's risk assessment. If the insurer has consented to trade in a conditional trading area subject to a certain ice class, the requirement of ice class will constitute a special safety regulation that shall apply in addition to any safety regulation that might apply by virtue of Cl. 3-22, sub-clause 1.

Local authorities may issue their own rules, recommendations or guidelines for operation in ice-infested waters within their area of jurisdiction. Examples of these are rules similar to the classification societies' rules on ice class, requirements to follow ice breakers and other regulations issued by the local ice navigation surveillance authorities. Whether such rules, recommendations or guidelines will satisfy the definition of a safety regulation in Cl. 3-22 will depend on whether such rules, recommendations or guidelines are binding on the assured, see further the Commentary to Cl. 3-22. In the Baltic, Finnish and Swedish ice surveillance authorities issue such recommendations. However, vessels are reportedly free to operate without complying with them. The only sanction will be that non-complying vessels will not get assistance from state owned icebreakers if stuck in the ice. Hence, the Finnish and Swedish ice surveillance authorities' recommendations cannot be deemed binding on the assured and therefore do not constitute a safety regulation according to Cl. 3-22. However, if authorities issue binding rules for navigation in ice-infested areas within their jurisdiction, then breach of these rules will also be a breach of safety regulations as governed by Cl. 3-25, sub-clause 1.

*Sub-clause 3*, deals with navigation in conditional trading areas. It is expressly provided that the vessel is held covered for trade in the conditional trading areas, but the insurer may charge an additional

premium and impose other conditions, cf. *sub-clause 2*. Entitlement to additional premium and to stipulate other conditions requires a genuine increase in the risk. If the ice in the Baltic Sea in a mild winter has formed later than the date stipulated in the appendix to the Plan, the requirements for imposing an additional premium are not met during the ice-free period. If the person effecting the insurance is not willing to accept the additional premium or any special conditions, he may request suspension of cover while the ship is in that area.

If the insurer has not been given prior notice as required by sub-clause 1, second sentence, the additional premium and any conditions must be set when the insurer is informed that the ship has sailed in a conditional area. In these cases, the person effecting the insurance must simply accept any additional premium and conditions the insurer might impose. Failure to notify will not have any other consequences for the person effecting the insurance unless damage occurs, cf. *sub-clause 3, first sentence*. If the ship sails in a conditional area with the consent of the assured and without notification having been given, the claim is recoverable subject to a deduction of 1/4, maximum USD 200,000. The word “claim” applies to any type of claim. It is not only the claim for repair of ice damage under the hull insurance that is subject to the deduction, but any claim for repair of any type of damage and any claim under a loss of hire insurance. One such deduction will apply to each individual insurance. The rationale is that the assured would have nothing to lose if there was no sanction for a failure to give notice. The deduction does not apply to total loss. It is also a requirement for application of the deduction that the assured has consented to vessel’s entry into a conditional area. If the ship enters into the conditional trading area without the consent of the assured, e.g., due to a mistake by the master or crew, or due to ice, any damage occurring will not trigger the extra deduction. The insurer will, however, always be entitled to charge an extra premium or impose other conditions pursuant to sub-clause 2 regardless of whether a deduction of ¼ (max. USD 200,000) is to be applied.

The deduction pursuant to sub-clause 3 is applicable in addition to the ordinary deductions prescribed in Cl. 12-15, 12-16 and 12-18. When calculating the deduction, the provision in Cl. 12-19 shall apply correspondingly, cf. *second sentence*.

*Sub-clause 3, third sentence* was new in 2016 and imposes a further reduction of the claim if the damage is a result of the assured’s failure to exercise due care and diligence by neglecting to notify the insurer that the vessel has entered a conditional trading area in accordance with sub-clause 1, second sentence. The further reduction of the claim shall be based on the degree of the assured’s fault and the circumstances generally, cf. Cl. 3-33. As opposed to Cl. 3-33, ordinary negligence of the assured is sufficient to entitle the insurer to a further reduction of the claim. Delay due to non-service from e.g. state owned ice breakers because the assured has neglected to follow the local authorities recommendations, may not be recoverable under the loss of hire insurance. Likewise, additional costs incurred for the same reason such as e.g. hiring, if available, non-state owned ice breakers may also be deemed unrecoverable.

Examples of relevant criteria for deciding whether the assured has exercised due care and diligence will be

- the experience of the master and/or duty officer in navigating in ice and the use of an ice pilot when appropriate.
- that the master and crew have received timely and appropriate information and instructions concerning the construction and capabilities of the insured ship in relation to the conditions prevailing.
- that requirements, recommendations and regulations of local authorities in respect of navigating in ice are complied with.

If the vessel has no ice class, it may be deemed negligent to operate it in ice-infested waters. The same applies if the vessel operates in ice conditions without having the appropriate ice class. Breach of local requirements etc. may amount to breach of safety regulations under Cl. 3-22 if the local regulations are binding on the assured. If so, the consequence of a breach is governed by Cl. 3-25. The ordinary rules on identification will apply, cf. Cl. 3-36 to Cl. 3-38.

*Sub-clause 4* is new and spells out that the insurance remains in full force and effect if the assured has given notice in accordance with sub-clause 1, and provided that the assured complies with the conditions, if any, as stipulated by the insurer.

If the damage is deemed to be caused by gross negligence of the assured, cf. Cl. 3-33, then the claim may be forfeited. The ordinary rules on identification will apply, cf. Cl. 3-36 to Cl. 3-38, unless otherwise is agreed.

*Sub-clause 5* sets out the rules for navigation in excluded trading areas. It follows from the *first sentence* that the assured is allowed to sail in excluded trading areas provided he has obtained advance approval from the insurer, subject to agreed terms. If no agreement has been reached, the cover will be suspended from the moment the ship enters the excluded area. For the insurance to be suspended, however, the master must have acted intentionally in exceeding the trading limit. Suspension pursuant to sub-clause 5 will apply only as long as the ship is inside the excluded area, cf. *second sentence*.

Cover will not be suspended if the ship enters into an excluded area as part of measures being taken to save human life or to salvage ship or goods, cf. the reference to Cl. 3-12, sub-clause 2, in the *third sentence*. In relation to Cl. 3-15, sub-clause 5 the insurance will not be suspended if the ship enters into an excluded area to seek a port of refuge or similar measures to save herself and/or her cargo.

If a casualty has occurred after insurance cover has resumed following a deviation, the general rules on causation in Cl. 2-11 apply. If it is clear that the ship sustained damage during the deviation, the

insurer will not be liable for new casualties occurring as a result of that damage. The reason is that these casualties must be attributed to the ship having been "struck by a peril" during the suspension period, cf. Cl. 2-11, sub-clause 1, but since the damage is known, the special rules on unknown damage in sub-clause 2 of the same Clause would not apply. If separate hull cover was taken out during the deviation, new casualties will be recoverable under that insurance contract. If, however, the damage sustained by the ship during the deviation is unknown, the new casualties will fall entirely under the ordinary hull insurer's liability.

Here, as elsewhere, the rules on apportionment in the event of a combination of causes must be applied. If a subsequent casualty is partly due to known damage which occurred during the suspension period and partly due to impact during subsequent exposure, the insurer will only be liable for a proportionate share of the loss, cf. Cl. 2-13.

The rules on trading areas under an insurance contract are separate from the issue of where a ship is allowed to sail under its trading certificate. A trading certificate is a certificate used instead of class approval for smaller vessels governing the area where it is permitted to trade, and loss of the trading certificate is dealt with specifically in Cl. 17-4, sub-clause 2. On the other hand, sailing outside the areas permitted by the trading certificate would be a breach of a safety regulation, and is governed by Cl. 3-22, or in the case of fishing vessels and smaller coasters, Cl. 17-5 (b).

In the 2007 version a number of amendments were also made to the appendix to the Plan regarding trading areas. The appendix contains further comments on these amendments.

### **Clause 3-16. Illegal undertakings**

This Clause corresponds to Cl. 40 of the 1964 Plan. The provision has no direct parallel in the relevant Nordic Insurance Contracts Acts.

*Sub-clause 1* establishes that use of the ship for illegal purposes constitutes a special alteration of the risk. Sub-clause 3, according to which the insurance terminates if the ship, with the consent of the assured, is substantially used for the furtherance of illegal purposes, has its origins in the 1930 ICA Section 35, which prohibited insurance of an "illegal interest"; see also the Commentary on Cl. 2-1 and Cl. 2-8 above. NL 5-1-2, which forbids contracts which offend decency, is based on somewhat different criteria, but leads to substantially the same result.

Under sub-clause 1 the insurer is free from liability for "loss that is a consequence of the ship being used for illegal purposes". Judging the causation issue may give rise to difficulty. It is not sufficient that the ship runs aground on a voyage with an illegal purpose about which the assured knew. The damage must, to a certain extent, be a foreseeable consequence of the illegal undertaking, e.g., where

the vessel must venture into hazardous waters in connection with a smuggling operation and runs aground. The more detailed application of this rule is a matter which must be left to the courts.

It is also a requirement that the assured "knew or ought to have known" of the illegal nature of the undertaking at a time when it would have been possible for the assured to intervene. If the crew uses the ship for illegal purposes without the knowledge of the assured, this is a risk against which the assured should be protected. Once the assured learns of the matter, however, the assured must intervene promptly, failing which the insurer may cancel the insurance contract on 14 days' notice, pursuant to *sub-clause 2*. The period of notice was three days under the 1964 Plan, but this has now been amended to conform with the other notice periods. The burden of proving good faith lies with the assured.

An undertaking or an activity is illegal not only when it violates the laws of the flag State, but also when it is unlawful under the laws of the State which has authority over the ship in the situation in question. The issue of whether the ship had a duty to comply with prohibitions or orders of another country's authorities must be determined in each situation, cf. also the comments to Cl. 3-22.

When the ship is being used for illegal purposes without the knowledge of the assured, the consequence will often be that government authorities intervene. If the ship sustains damage as a result of a customs search, this will have to be indemnified by the marine hull insurer. The same applies if the ship is definitively seized because of the illegal undertaking. Damage and intervention of this nature do not fall under Cl. 2-9, sub-clause 1 (b), cf. the Commentary to that provision, and are therefore not excluded from the perils covered by the marine insurer.

There may sometimes be some doubt as to whether it is the marine perils insurer or the war risks insurer which must pay for a loss that is the consequence of an illegal activity undertaken without the knowledge of the assured. The deciding factor will be what falls under the expression "other similar intervention" in Cl. 2-9, sub-clause 1 (b).

The rule in *sub-clause 3* will apply, e.g., if the assured puts the ship to use in regular smuggling traffic. If so, it should not matter that the ship also carries some legal cargo. The decisive factor will be whether the ship is used principally for the purposes of the illegal undertaking.

### **Clause 3–17. Suspension of insurance in the event of requisition**

Sub-clause 2 was moved to Cl. 15-24 (b) in the 2007 version. The sub-clause is otherwise identical to earlier versions of the 1996 Plan.

*Sub-clause 1, first sentence* sets out the principal rule, i.e. that in the event of requisition by a State power, all of the ship's insurances are suspended. This applies regardless of whether the insurance is against marine perils, cf. Cl. 2-8, or war risks, cf. Cl. 2-9, and regardless of whether the requisition is carried out by the ship's "own" State power or a "foreign" one. It does not matter, for the purposes of the provision, whether it is the ownership or merely the use of the vessel which is requisitioned, although Cl. 3-21 does provide that the insurance cover terminates if the ship changes owner. It is often difficult to determine whether a requisition is intended to be temporary or of a permanent nature, and for this reason it is most appropriate that cover be suspended and not definitively terminated. This provision is thus a specific rule in relation to Cl. 3-21. If the requisition ceases before the insurance period expires, the insurance will again come into effect, cf. *second sentence*. The *second sentence* regulates the right of the insurer to cancel the insurance. In the 2007 version, sub-clause 2 was moved to Cl. 15-24 (b) in connection with the fact that all the specific rules for insurance with the Norwegian Shipowners' Mutual War Risk Insurance Association were collected in a new Section 9 in Chapter 15. The move entails no change in points of substance.

### **Clause 3–18. Notification of requisition**

This Clause corresponds to Cl. 42 of the 1964 Plan.

*Sub-clause 1* imposes on the assured a duty to notify the insurer if the ship is requisitioned or is returned, while *sub-clause 2* gives the insurer authority to demand a survey of the ship when the requisition is over and the ship has been returned. When the insurance comes into effect again after a requisition, the same types of causation problems arise as when the insurance cover has been suspended due to the ship navigating beyond the trading areas. The Plan's general rules on causation also apply in the event of requisition, cf. Cl. 2-11. If the ship has sustained unknown latent damage during the requisition period, the insurer will bear the risk of the later effects of that damage. Consequently, the insurer has a specific interest in receiving notice of the return of the vessel, so that he may exercise his right to demand a survey pursuant to sub-clause 2. Latent damage discovered in the survey shall be deemed to be "known" for the purposes of Cl. 2-11. If the survey reveals that the ship is a significantly worse risk than prior to the requisition, the insurer may then cancel the insurance pursuant to Cl. 3-17, sub-clause 1, third sentence.

If the ship sustains a casualty after it is returned, and the insurer wishes to plead that the casualty is due to a casualty or circumstance which occurred while cover was suspended, the burden of proof will be on the insurer, cf. Cl. 2-12, sub-clause 2. If the shipowner fails to report the return of the vessel, thereby depriving the insurer of the opportunity to obtain evidence, it is reasonable to then place the burden of proof on the assured. Sub-clause 3 of the clause contains a rule to this effect.

### **Clause 3–19. Suspension of insurance while the *vesse*/is temporarily seized**

This Clause corresponds in part to Cl. 16 of the 1964 Plan, sub-clause 3.

If the ship is temporarily seized by a foreign State power, without there being a requisition within the meaning of Cl. 2-9 and Cl. 3-17, it is appropriate that the insurance against marine perils be suspended, as in the event of requisition under Cl. 3-17, although suspension of the war risks cover is not necessary. On the contrary, in keeping with Cl. 16, sub-clause 3, of the 1964 Plan, it is natural to let the war risks cover take over the risk of marine perils as well.

### **Clause 3–20. Removal of the *vesse*/to a repair yard**

The Commentary was amended in the 2010 version. This Clause corresponds to Cl. 44 of the 1964 Plan.

*Sub-clause 1* imposes on the assured an obligation to notify the insurer if a removal of the ship to a repair yard entails an increase in the risk. The provision is identical to Cl. 44, sub-clause 1 of the 1964 Plan with the addition that the risk must have increased as a result of damage. Notice is necessary to give the insurer the opportunity to assess whether to object to the removal, cf. below. It is sufficient to give notice to the claims leader, cf. Cl. 9-6.

A "removal" of the ship means that it will undertake a voyage, under its own propulsion or under towage, exclusively for the purpose of being brought to a dry-dock or repair yard. The voyage will not be regarded as a removal if the ship is in such good condition that it takes a new cargo to the port where the survey or repairs are to be carried out. It may be deemed a "removal", however, even if the ship retains a cargo which was on board at the time the casualty occurred; the decisive factor will be whether the ship is in such condition that the shipowner may incur liability for unseaworthiness if a new cargo were to be taken on board after the casualty has occurred.

A ship will not usually be given permission by the relevant authorities to sail when there is a breach of the rules regarding technical or operational safety. For "removal", however, the authorities will usually grant dispensation based on an assessment of the situation, in which the economic aspects of a removal will play a certain role. As long as the assured takes up the matter with the authorities and obtains the necessary permits, the insurer who is liable for the casualty may not invoke a breach of technical or operational safety regulations during the removal. However, if the assured deceives the insurer on this aspect, all cover relating to the ship will be lost (cf. rules on breach of safety regulations).

*Sub-clause 2, first sentence* gives the insurer the right to object to a removal to a repair yard which creates a substantial increase of the risk. This provision must be read in conjunction with the Plan's

other provisions relating to removal. Under Cl. 11-6, the insurer may, in response to a request for condemnation, request that the ship be moved to a port where it may be properly surveyed. The risk thereof shall be transferred to the insurer who requests that the removal be carried out, cf. Cl. 11-6, sub-clause 2; it is not possible to object to the removal in this situation. It will not normally be possible to object to an ordinary removal to a repair yard under Cl. 12-13, either. A removal of this nature is an entirely ordinary use of the vessel which any marine insurer must be prepared to expect during the period of insurance. Consequently, the removal should be able to take place without any extra premium being charged during the move (provided there is no breach of technical or operational safety regulations).

Even an ordinary removal to a repair yard may involve a substantial increase of the risk, if the assured opts to have the vessel repaired at a particularly remote repair yard or at a place that can only be reached by sailing through hazardous waters. In that case, it is reasonable that the assured bear the extra risk that a removal of this type entails. This is achieved in the second sub-clause, under which the insurer may impose a veto in certain situations, with the effect that the insurance cover is suspended and the assured must take steps to obtain other insurance to cover the risk.

The provision may be invoked by any insurer who has granted cover for the ship in question, cf. Cl. 12-13, sub-clause 3, which expressly states that the provision may also be used by a hull insurer which is liable for the damage to be repaired.

In practice, a claims leader will ordinarily be appointed for the hull insurance. In such case, the claims leader decides the issue of removal on behalf of the co-insurers, cf. Cl. 9-6, and the insurers for the separate insurances against total loss, cf. Cl. 14-3, sub-clause 4. If the claims leader has accepted the removal of the ship, the individual co-insurer or total loss insurer may not invoke the provision in Cl. 3-20.

For the insurer to be able to disclaim liability during the removal, it must entail a "substantial increase of the risk". If this is the case, a determination must be made in relation to each insurer invoking the provision. A hull insurer against marine perils will be able to object to a particularly hazardous removal of a ship damaged by war perils, for example, or to a removal which requires the vessel to be towed across open stretches of sea.

If a hull insurer who is liable for the ship's damage is to be able to invoke the provision, there must be other, less perilous options available. If there is only one single possibility of the ship being repaired at all, the alternative can be that the ship may be condemned where it lies. If the hull insurers do not want the ship condemned, then they must bear the risk during the removal. On the other hand, a hull insurer who is not liable for the casualty may, depending on the circumstances, be able to invoke Cl. 3-20.

*Sub-clause 2, second sentence*, provides that an insurer who has objected to a removal will not be liable for "loss that occurs during or as a consequence of the removal". If the claims leader under the hull insurance has objected to the removal, the co-insurers and interest insurers will also be free from liability in this connection, cf. above. The insurer(s) freed of liability will not be liable for any loss which occurs while the removal is under way, even though the loss may be unconnected to the increase of the risk. Likewise, the insurer may disclaim liability for loss arising later on, although only to the extent that he proves that the loss is due to the removal. The question of the insurer's liability must thus be determined on the basis of the general rules of causation. The insurer may not disclaim liability for a casualty which occurs purely by chance at the port to which the ship has been removed, on the grounds that the casualty would not have occurred had the ship remained where it was.

To the extent that it is the claims leader under the hull insurance who has objected to the removal, the assured will not be covered under this insurance or under the separate total loss insurances for damage or loss occurring during the removal, unless he takes out a special hull insurance for the removal period. If, in exceptional cases, no claims leader has been appointed, one or more of the co-insurers under the hull insurance may accept the removal. In such case, these insurers will accept the risk for which the other co-insurers have disclaimed liability by objecting to the removal, cf. Section 12-13, sub-clause 2.

The assured must be notified of a disclaimer of liability under sub-clause 2, first sentence, before the removal is commenced, so that the assured and any other insurers he may have may arrange necessary additional insurance. If the assured has failed to notify the insurer pursuant to sub-clause 1, the insurer has no opportunity to object to the removal, and thus will not be liable for any loss arising during or as a consequence of the removal, cf. sub-clause 2, second sentence. The risk is, in that case, transferred to the assured and not to another insurer. This may seem a rather stringent sanction for negligence on the part of the assured, but it is difficult, from a legal standpoint, to come up with any other satisfactory rule. A rule freeing the insurer in question from indemnification of loss resulting from the extra risk during the removal, for example, would create major difficulties in evaluating causation.

### **Clause 3–21. Change of ownership**

**The Commentary was amended in the 2019 Version.**

The provision **sets out that** the insurance cover **will** automatically **lapse if the ownership of the vessel changes**. In reality, the issue of cover in the event of a change of ownership is usually one of cover of a third party's (the purchaser's) interests in the ship. The Plan's approach in this connection differs from the relevant Nordic Insurance Contracts Acts (Nordic ICAs), which gives the purchaser, as a starting premise, automatic co-insurance cover. Cover is even mandatory for the first 14 days after the transfer for insurance subject to the Nordic ICAs' compulsory rules. In marine insurance, however,

the risk is usually so closely related to who is controlling the vessel **and with that the** management and other matters, that a change of ownership should unconditionally result in termination of insurance cover.

The provision only applies in the event of a transfer to a "new owner". **First of all**, if a transfer is simply part of an intra-company re-organisation which does not entail a change in the actual ownership interests, the insurance will remain in effect in the usual manner. Nor will a change in the shareholder structure of a shipowning company be covered by the rules. **The same applies if a shipowning company is merged with another company or is subject to a demerger. Merger and demerger are based on a principle of continuity meaning that the old company continues within the merged or demerged company.**

The provision affects all types of insurance relating to the ship, and not just the hull insurance.

The insurance will lapse only as regards casualties which occur after the change in ownership. If the ship has known, unrepaired damage at the time of the transfer for which the insurer is liable, the vendor has a conditional claim against the insurer which can be transferred along with the ship, cf. the Commentary below on Cl. 12-2.

When the insurance terminates pursuant to Cl. 3-21, the person effecting the insurance may claim a reduction of the premium pursuant to Cl. 6-5.

### Section 3 Safety regulations

Cl. 3-22 was amended in 2016. Further, the Commentary to Cl. 3-22 and Cl. 3-25 and this introduction to Section 3 were amended.

Historically, this Section of the Plan contained both provisions concerning safety regulations and provisions concerning seaworthiness. In the 2007 Version, however, the rule regarding unseaworthiness was revoked in its entirety.

The reason for this amendment was the entry into force of the Norwegian Ship Safety and Security Act of 2006 on 1 January 2007. The Ship Safety and Security Act replaced *inter alia* the Norwegian Seaworthiness Act of 1903, in which the concept of seaworthiness played a prominent role, cf. first and foremost Section 2. It was therefore logical, and in keeping with general traditions in marine insurance law, that the previous marine insurance Plans made seaworthiness a key factor. At the same time, subsequent developments, particularly the growing significance of safety regulations issued by

the public authorities or by classification societies, showed that there was a declining need for a separate rule on seaworthiness, and that the overlapping of such a rule with the system of safety regulations could, on the contrary, have unfortunate consequences.

The concept of seaworthiness could, in principle, impose more stringent requirements on the assured than the requirements laid down by the provision regarding breaches of safety regulations if the ship had defects which were relevant to the ship's safety, but which might not have been covered by the safety regulations in force. One aim of doing away with the concept of seaworthiness in the 2007 version was thus to make it clear that the duties of the assured in this respect were limited to complying with safety regulations as they are defined in Cl. 3-22. In this way, insurers were deprived of the possibility of asserting that even though the ship satisfied the relevant safety regulations, it was nevertheless unseaworthy on account of a defect. This also creates a greater degree of predictability for the assured because the concept of unseaworthiness is not a clearly defined term, but a legal standard that creates uncertainty as regards the content of the concept.

In the Norwegian Ship Safety and Security Act, the legislature has chosen to no longer apply the concept of seaworthiness. Instead, the statute sets out – in a more concrete, explicit manner – the requirements that must at all times be satisfied by the management on shore and the master and officers on board the ship. These requirements relate to four specific matters, each of which is covered in a separate Chapter of the Act: Technical and operational safety (Ch. 3), Personal safety (Ch. 4), Environmental safety (Ch. 5) and Safety and Terrorism Preparedness (Ch. 6). Furthermore, the Act lays down a general principle of safety management (Ch. 2), whereby the shipowner must ensure that a safety management system, which can be documented and verified, is established, implemented and maintained in his organisation and on each ship. The safety management system must be used to identify and control risks, and ensure compliance with requirements laid down in or pursuant to statutes or set out in the safety management system itself. The latter also entails compliance with all provisions of the other chapters of the Norwegian Ship Safety and Security Act and appurtenant regulations.

In relation to the regulation of safety regulations in the Plan, the requirements in Chapters 3 to 6 of the Norwegian Ship Safety and Security Act with accompanying regulations, which incorporate the specific rules found in international conventions such as SOLAS, MARPOL etc., may be characterized as traditional safety regulations. The regulations provide for specific and detailed duties that the shipowner has to comply with. Of particular relevance to the Plan is Chapter 3 on Technical and operational safety. These rules are based on the same legislative technique as the Plan and causes no specific problems. The principle of safety management, on the other hand, raises more difficult questions with regard both to the concept of safety regulation, the question of causation and the burden of proof. These questions are addressed below in the Commentaries to Cl. 3-22 and Cl. 3-25.

The background for phasing out the rules on seaworthiness is, as aforesaid, the Norwegian Ship Safety and Security Act. This Act is only applicable to ships under the Norwegian flag. For ships under the flag of another country, the safety rules of the flag state will be decisive. If the flag state applies the seaworthiness concept, as is the case in the Nordic countries other than Norway, this will be relevant in the form of compliance with the safety requirements set by the legislature and the classification society as a condition for seaworthiness. The Committee has assumed that this will normally not cause any problems because under the current international rules unseaworthiness normally presupposes a breach of a rule that qualifies as a safety regulation, but reference is made to the reason for the abolishment of the concept in the 2007 Version of the Plan above.

### **Clause 3–22. Safety regulations**

Sub-clause 3 was deleted in 2016, see further the amended Cl. 3-15 with its Commentary, and a new sub-clause 3 was provided. The Commentaries were also amended in 2016.

*Sub-clause 1* defines safety regulations as “rules concerning measures for the prevention of loss”.

A fundamental requirement in order for a rule to have the status of safety regulation is that it is intended to prevent loss. A requirement may sometimes pursue several purposes. If one of them is to prevent casualties or mitigate their effect, then a breach may be relevant under the Plan’s rule. Thus, a class-related requirement will always have the status of safety regulation, as will requirements primarily aimed at preventing oil spills; e.g. marine pollution rules. However, if the requirement is linked to an entirely different purpose (e.g. immigration or customs regulations), it is difficult to envisage a relevant causal connection between a breach of a rule committed by the assured and damage sustained by the ship. Cases like this must come under the rule against illegal undertakings in Cl. 3-16.

The text states that safety regulations can be expressed in four different ways. The first alternative is that the rule is issued by “public authorities”. The term “public authorities” means public authorities in all states providing the rule is binding for the assured and consequently a duty the assured must adhere to. The natural starting point is the regulatory regime of the Flag State. For instance in Norway, the relevant act is the Norwegian Ship Safety and Security Act and requirements laid down by its regulations. In addition to the rules of the Flag State, a shipowner must also comply with requirements that follow from rules and regulations of the company’s country of domicile as well as those that become applicable by reason of the vessel’s location, e.g. while in coastal waters, or a port or while passing through a canal. If a conflict arises between the requirements of a Flag State and requirements originating in another applicable regime, the most stringent will apply with the presumption that this will be binding for the assured. However, it has to be recognised that good faith misunderstandings of which requirements take precedence could arise.

Regulations prescribed by public authorities become binding when they come into force for the insured ship, even if this is after the risk attaches. It can be assumed that adequate advance notice will have been given to the shipowners.

International conventions such as the SOLAS Convention of 1 November 1974 and subsequent amendments are not directly binding for the shipowner, but will become applicable as a safety regulation once adopted into the laws of individual countries. How a rule issued by a public authority has come into existence is in itself not significant. In the case of ND 1973.450 NH RAMFLØY, it was held that a rule set out directly in a statute was a safety regulation under the Plan.

Traditionally, safety regulations provided by public authorities are specific and concrete and provide for described actions to be taken by the shipowners to promote safety. Such provisions may be technical requirements related to design, construction and maintenance, cf. for example in Norway the Ship Safety and Security Act Chapter 3 with accompanying regulations, which incorporate the specific rules found in international conventions like SOLAS, MARPOL, etc. However, in the last 40 years the focus in international and national safety regulation has shifted from such direct requirements to the establishment of safety management systems. The most important step in this development was the introduction of the International Safety Management (ISM) Code into SOLAS by the 1988 Protocol. The ISM Code can be found in SOLAS Chapter IX, and is included in the national legislation of most flag States, cf. for example for Norway Chapter 2 and the Ship and Security Safety Act.

The approach to safety that underlies the ISM Code emphasises the role of management in establishing procedures and instructions for the safe operation of the vessel. It also recognises that the extent and content of such procedures and instructions must be relative to the operation of the vessel. However, according to 1.4 of the Code there are certain functional requirements that must be addressed:

*“Every Company should develop, implement and maintain a safety management system which includes the following functional requirements:*

- 1. a safety and environmental-protection policy;*
- 2. instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;*
- 3. defined levels of authority and lines of communication between, and amongst, shore and shipboard personnel;*
- 4. procedures for reporting accidents and non-conformities with the provisions of this Code;*
- 5. procedures to prepare for and respond to emergency situations; and*
- 6. procedures for internal audits and management reviews.”*

A central part of the ISM Code is a requirement for the operating company to obtain a Document of Compliance issued by an appropriate authority. This document must be kept on board each ship and each ship must also obtain a Safety Management Certificate. It is the task of the vetting authority to evaluate whether the specific procedures and instructions adopted are suitable in the context of the shipowners' or managers' operations. The vetting authority is the Flag State, or a classification society or other bodies that have been delegated such authority by the Flag State.

The status of the ISM Code with regard to the concept of safety regulation in Cl. 3-22 has caused uncertainty in practice. The previous Commentary stated that it “is the establishment of the safety management system *per se* that constitutes the safety regulation and not the individual provision.” This implies that the individual policies, instructions and procedures contained in the Safety Management System (SMS) for the ship does not constitute a safety regulation according to Cl. 3-22. Hence, the insurer may not invoke breach of such procedures etc. This view was followed in ND 2010.164 Oslo FRIENDSHIPGAS. Under the 2016 amendment of the Plan it was discussed whether individual provisions must be seen as part of the ISM regulation and therefore each provision in the system constitutes a safety regulation. However, as the Safety Management System will contain individual policies, instructions and procedures that may vary substantially between different shipowners, this would put a prudent shipowner with a more detailed system in a worse position with regard to the insurance cover than a shipowner who has chosen a less detailed system. It would be contrary to the goal of the ISM regulation if shipowners were induced to establish a less rigid system in order to prevent the risk of losing their insurance cover due to the breach of a safety regulation. It was consequently agreed that the individual instructions and procedures in the SMS do not constitute a safety regulation according to Cl. 3-22.

On the other hand, the duty according to the ISM Code is to “*develop, implement and maintain*” the Safety Management System. A mere establishment is therefore not enough if the system is not prudently maintained. Further, a repeated breach of the individual instructions or procedures may indicate that the Safety Management System is in reality not implemented or maintained by the management, or that they have failed to supervise the system, cf. further under Cl. 3-25 below. Seen in this perspective, the judgement in ND 2010.164 Oslo “FRIENDSHIPGAS” is too categorical when it states that a breach of the shipowner's individual manuals neither directly nor indirectly constitutes a breach of a safety regulation according to the Plan. To the extent an individual manual repeatedly is breached by the management, depending on the circumstances in each case such breach may also be considered breach of a safety regulation.

The second alternative in Cl. 3-22, sub-clause 1, is rules “stipulated in the insurance contract”. These words have caused a discussion on whether they include the safety regulations stipulated in the Plan itself, i.e. whether the safety regulations stated in the Plan is considered to be “in the insurance contract”. Such clauses are today for instance found in Cl. 3-22, sub-clauses 2 and 3, Cl. 3-26 and

Cl. 18-1 (e). When the insurance contract is based on the Plan, the Plan is a part of the insurance contract and the mentioned safety regulations are thus “stipulated in the insurance contract”. A narrow interpretation of these words would exclude the safety regulations in the Plan from the definition of safety regulations in Cl. 3-22. Traditionally, the Plan did not contain any clauses that were intended to function as safety regulations, but this has changed over the years, cf. the clauses mentioned above. Hence, there is no doubt that these Plan clauses both by their wordings and intent shall be treated as safety regulations according to Cl. 3-22, sub-clause 1. However, to get the status of a safety regulation, it must follow from the wording of the clause and/or a reference to Cl. 3-22 and/or Cl. 3-25 that this is the intent.

In addition, the individual insurance contract can itself contain provisions concerning measures to be taken to ensure the technical and operational safety of the vessel. If these are clear and specific, they will fall within Cl. 3-22.

The third alternative is rules “prescribed by the insurer pursuant to the insurance contract.” Cl. 3-15, sub-clause 2, second sentence, as amended in Version 2016 gives the insurer authority to prescribe safety regulations. Authority for an extremely limited exercise of this power is also found in Cl. 3-28. If the insurer wishes to include powers beyond what is provided by the Plan in order to also have the authority to issue new safety regulations during the insurance period, a specific provision to that effect must be inserted into the individual insurance contract.

In practice, this means that the contract must contain written authority and set out clear parameters for subsequent safety regulations. If such parameters or authority is not included in the contract, the insurer must resort to the rules on alteration of the risk. Under these rules, the insurer may only impose new requirements if a situation has arisen that constitutes an alteration of the risk in accordance with Cl. 3-8. If this is the case, the insurer may exercise his right to cancel the contract, and establish a new contractual relationship with new requirements.

The fourth alternative is rules issued “by the classification society”. Cl. 3-14 makes it clear that the insured ship’s class status must be maintained in order for cover to remain in force. However, failure to comply with class requirements does not automatically lead to loss of class. Including class requirements as safety regulations further emphasises the importance of compliance. It also provides insurers with a possible sanction if failure to comply with a class requirement should be the cause of a casualty. Similar to government regulation, orders from classification societies receive the status of safety regulation from the time they are adopted or issued.

The provision in *sub-clause 2* emphasises that the requirement of periodic surveys imposed by public authorities or the classification society constitutes a safety regulation under sub-clause 1. The provision is basically superfluous requirements issued by the classification society, including orders to

carry out a Continuous Machinery Survey, will automatically constitute a safety regulation under Cl. 3-22, sub-clause 1. However, it is necessary to be able to extend the scope of identification in such cases for breaches of this duty, like the one that applies to “a special safety regulation, laid down in the insurance contract”, cf. Cl.3-25, sub-clause 2. As a safety regulation prescribed in the Plan as mentioned above constitutes a safety regulation “laid down in the insurance contract”, the extended identification rule in Cl. 3-25, sub-clause 2, second sentence, will apply unless the safety regulation itself only refers to Cl. 3-25, sub-clause 1, cf. for instance Cl. 3-26 second sentence and Cl. 18-1 (e) last sub-paragraph. In such case, the safety regulation in the Plan has status as “safety regulation” according to Cl. 3-22, sub-clause 1, but not a “special safety regulation” according to Cl. 3-25, sub-clause 2.

Sub-clause 2, second sentence, imposes a duty on the assured to carry out the survey by the stipulated deadline. A breach of this safety regulation will arise as soon as the deadline is exceeded; no reaction is required on the part of the classification society in the form of a reminder or even withdrawal of class, cf. the above Commentary regarding Cl. 3-14.

If the classification society grants a postponement of a periodic survey, the provision will not be triggered; in such case no breach of any safety regulation will have occurred. However, a postponement must in fact have been granted; it is not sufficient that the classification society would have granted a postponement if the assured had requested it.

The provisions regarding periodic surveys in Cl. 3-22, sub-clause 2, cf. Cl. 3-25, sub-clause 2, are a supplement to Cl. 3-14. The classification society may at any time cancel the class in the event of breach of the duty to carry out periodic surveys, with the result that the insurance cover lapses in its entirety.

Cl. 3-22, *sub-clause 3*, was amended in 2016. The previous rule concerning the effect of ice class was abolished, see the Commentary to Cl. 3-15. However, a new rule replaces the previous exclusion in Cl. 12-5 (f) for liability for loss due to lubricating oil, cooling water or feed water becoming contaminated. This former exclusion also extended the circle of persons with whom the assured could be identified with to include the master and chief engineer. Sub-clause 3 imposes instead a duty for the assured to ensure that the Safety Management System “includes instructions and procedures for the use and monitoring of lubricating oil, cooling water and boiler feed water.”

The duty under this safety regulation is «to ensure» that the system includes the mentioned instructions and procedures. If the vetting authorities accept these instructions as part of the Safety Management System, the assured has satisfied his duties under the new sub-clause 3. The concept of safety regulation is the same as according to Cl. 3-22, sub-clause 1. This means that the individual instructions and procedures will not constitute a safety regulation as such, but repeated breaches of

such instructions and procedures may imply a failure on the part of the management to supervise compliance with the system. Whether the insurer can invoke such failure will depend on whether there was a causative connection between the breach and the loss or damage, and whether the assured had acted negligent, see further under the Commentary to Cl. 3-25.

It can be argued that establishing appropriate instructions and procedures for the matters named in sub-clause 3 is regardless a natural part of any functional SMS. However, the ISM Code is, as noted above, deliberately designed to give shipowners flexibility to develop and tailor a safety system to their specific operation. Experience has shown that losses related to lubricating oil, cooling water and boiler feed water very often arise from the erosion of sound practice at the operational level. These matters are important in preventing not just costly damage to machinery, but also loss of propulsion and the dangers that inevitably follow from it. The deleted provision in Cl. 12-5 (f) addressed this fact by a very concrete rule including a somewhat arbitrary three month time limit. Contrary to this rather stringent approach, the new provision in sub-clause 3 underlines the undisputed fact that ensuring consistency at the operational level is a management function with the SMS being the main tool management has to achieve this. It follows that the person with the overall responsibility for a company's SMS will be regarded as part of that company's management, acting on behalf of the assured irrespective of their formal title and place in the organisational hierarchy.

Sub-clause 3 refers to Cl. 3-25, sub-clause 1, and not to sub-clause 2. This means that the extended identification rule in Cl. 3-25, sub-clause 2, does not apply.

### **Clause 3–23. Right of the insurer to demand a survey of the *vessel***

*Sub-clause 1* gives the insurer authority to demand a survey of the ship at any time during the insurance period for the purposes of ascertaining that the ship meets the technical and operational safety regulations that are prescribed by public authorities or by the classification society.

The insurer must always bear the cost of any survey he requests. If the survey reveals that the ship has defects which must be rectified and for which the insurer is liable, the Plan's other rules on liability of the insurer during repairs will be triggered. The insurer will then be liable for related expenses under the usual rules, although not for the assured's operating expenses for the ship or other financial loss incurred as a result of the repairs (but see Cl. 12-13 on the ship's operating expenses during removal to a repair yard). The result is the same regardless of whether the immediate reason for the survey was a casualty.

If no damage is found which must be repaired for the purposes of the ship's technical and operational safety, the issue arises as to whether the assured should be indemnified for his loss. If a casualty or other similar circumstance covered by the insurance has occurred previously, the assured has, under

general principles, the obligation to allow the ship to be inspected for the purpose of ascertaining whether there is damage. The expenses of the inspection may be claimed from the hull insurer, but the assured must bear the operating costs and loss-of-hire for the time during which the inspection is carried out. The expenses of unloading for a survey following a casualty are indemnified under special rules, usually general average, but also under Cl. 4-12 regarding particular measures taken to avert or minimise the loss. If no event has occurred which requires the assured to allow the ship to be inspected, but the insurer requests the survey due to a general suspicion of poor maintenance, it is reasonable to have the insurer bear the full liability if the suspicion turns out to be unfounded. Accordingly, *sub-clause 3* of the Clause provides that the insurer shall, in such cases, indemnify the assured for costs as well as loss resulting from the survey.

In practice, the insurance contract sometimes contains a provision under which the insurer reserves the right to have the ship undergo a condition survey, instead of a pre-entry survey, because the shipowner contacts the insurer so close in time to the annual renewal that there is not time for a survey before the contract is to be renewed. If a condition survey has been agreed upon, the insurer does not need authority under Cl. 3-23 to request a survey of the ship. Usually, the reservation in the insurance contract will also provide sanctions the insurer may invoke if the ship turns out not to meet the requirements as regards technical and operational safety, e.g. rules regarding the right of the insurer to require that repairs be made, as well as sanctions if the necessary repairs are not carried out. If the contract does not provide for any sanctions, one then falls back on the general rules of the Plan, i.e. the right to cancel under Cl. 3-27. The insurer may not invoke other or more stringent sanctions in the absence of clear authority to do so in the contract. This means, for example, that the insurer may not cancel the contract due to other circumstances or on shorter notice than that prescribed in Cl. 3-27.

### **Clause 3–24. (open)**

In earlier versions of the 1996 Plan, this provision contained rules on safety regulations. In the 2007 version, the Clause was moved to Cl. 3-22 and in that connection slightly amended.

### **Clause 3–25. Breach of safety regulations**

The Commentary was amended in 2016.

Under *sub-clause 1, first sentence*, the assured will lose insurance cover if he can be blamed for breaching the safety regulation and there is a causal connection between the breach and the loss. The sanctions may be applied to all forms of negligence. In ocean hull insurance, the fault of the assured will often manifest itself by the assured failing to supervise his staff's compliance with applicable rules. In relation to the ISM Code, there may be fault with regard to implementation or maintenance of the safety management system, but due to the vetting system this is less practical. However, the assured may be guilty of a failure to supervise that the system is followed. The extent of

the assured's duty of supervision must be determined on a case by case basis, cf. ND 1980.91 Hålogaland TOTTSHOLM. If the assured has delegated supervision duties to the captain or officers on board, or to certain persons on shore (cf. the "designated person" that shall be appointed according to the ISM Code), he may be identified with them within the meaning of Cl. 3-36, sub-clause 2.

The requirement of a causal connection between the breach of the safety regulation and the loss will normally not be difficult if the safety regulation contains a specific duty for the assured to comply with, cf. the duties specified for example in the Norwegian Ship Safety and Security Act Chapter 3 with accompanying regulations. It is more difficult to establish causation in the case of regulations like the ISM Code, which requires the shipowner to ensure the establishment, implementation and maintenance of a safety management system that can be documented and verified in the shipowner's own organisation and on individual ships. Breaches of these formal requirements will less frequently be the cause of the casualty in question. However, if the management fails to supervise that the system is complied with and this leads to repeated breaches of procedures for e.g. lookout, this may result in a collision and thus causation between breach of the ISM Code and the casualty.

The provision in Cl. 2-13 on concurrent causes will, in some situations, lead to a reduction of the insurer's liability. A typical example of this is when a breach of a safety regulation has combined with an error committed by a member of the crew in his service as a seafarer, cf. Cl. 3-36, sub-clause 1, to cause the loss. Breaches of safety regulations such as the ISM Code and similar rules prescribed by national authorities in accordance with the SOLAS convention, etc., are probably good examples of situations where there can be a question of a combination of causes, assuming of course that there is a causal connection between the infringement of the duties related to the safety management system and the loss sustained.

*Sub-clause 1, second sentence* makes an exception from the rule in the first sentence in cases where a master or crew member is also the shipowner. In those cases, it would be too stringent a sanction to let every blameworthy breach of any safety regulation entail loss of cover. Thus the rules in the first sentence do not apply when the negligence of the assured is "of a nautical nature". In that case, one falls back on the general rules applicable when the assured brings about the casualty, in Cl. 3-32 and Cl. 3-33. The concept "of a nautical nature" comprises not only the rules of navigation as such but, depending on the circumstances, may also include port and canal regulations, regulations for passing minefields and other obstructions, regulations on the use of radio equipment in emergencies, etc.

If, however, the insurer has found it necessary to impose a special safety regulation at the time the contract is entered into, e.g., that the vessel must only be used in sheltered waters, or that there must be special equipment on board for safety reasons, then there is reason to have more stringent rules. In those cases, the insurer must be able to invoke negligence committed by anyone who is under a

duty on behalf of the assured to comply with the regulation or ensure that it be complied with, cf. *sub-clause 2, first sentence*. Generally speaking, people who work in a senior position in the service of the assured will have a duty to comply with the regulation or ensure that it is complied with. The shipmaster, mates and engineers in particular are crew members who will be covered by the rule. In addition, the nature of the regulation in question will, to a certain extent, determine how far down in the ranks identification will take place.

In view of the comprehensive nature of the concept of a safety regulation under Cl. 3-22, the question might be asked whether the shipowner may invoke the defence that he was unaware of, for instance, regulations issued by public authorities. If it is a question of regulations issued by the flag State, this must be answered in the negative, cf. ND 1986.226 Namdalen SYNØVE. On the other hand, depending on the circumstances, it must be possible to accept as a defence that the assured has misinterpreted the regulations, provided the interpretation is justifiable, cf. ND 1982.328 Kristiansund HARDFISK. With respect to alleged ignorance of regulations issued by another State, the question must be considered on a case-by-case basis.

The provision in *sub-clause 2, second sentence*, stated that the extended rule of identification also applied to the safety regulation on periodic service in Cl. 3-22, sub-clause 2. This was deleted in 2016 as it is clarified that a safety regulation in the Plan constitutes a “safety regulation laid down in the insurance contract”. This means that such safety regulation also constitutes a “special safety regulation” according to Cl. 3-25, sub-clause 2, unless it is expressly provided that the extended identification shall not apply. This is achieved if the safety regulation in the Plan only refers to Cl. 3-25, sub-clause 1, see as an example Cl. 18-1 (e).

Sub-clause 3 regulates burden of proof. According to the first sentence, the insurer has the burden of proving that a safety regulation is breached. This means that the insurer must establish the existence of a safety regulation, which of course is an easy burden when it comes to applicable SOLAS rules or incorporation of the SOLAS rules in the relevant flag states legislation. Equally easy is the burden if there is a breach of the rules of the relevant classification society. When it comes to special safety regulations stipulated in the insurance contracts or prescribed by the insurer pursuant to the insurance contract, the insurer must satisfy that such rules has in fact been given and have the required basis in the insurance contract.

If the insurer alleges that the assured has committed a breach of his obligation to design, implement (establish) and maintain a suitable SMS system, the insurer must specify in which way the assured is at fault in relation to this general obligation.

Approval by the vetting authority is strong *prima facie* evidence that an appropriate system is established. Consequently, the insurer must produce evidence if alleging that the system itself is either

inadequate, lacking some essential element or that it has not been properly established within the organisation or on board. More commonly, the issue is whether the system has been followed, monitored and maintained for instance through prudent reporting and evaluation systems.

It is not a breach of the ISM Code that the established management system could be improved. One of the reasons why the ISM Code is based on general functional requirements rather than prescriptive rules is that the system shall be able to develop and adapt in light of experience. The discovery of weaknesses that can be improved is evidence of a functioning system. It is important not to compromise this process by fear of the consequences. Loss of insurance cover is such a serious matter that it can only be justified when an evaluation of all the evidence shows that the system as such failed either because it was quite inadequate, had not been implemented or had not been followed up at the relevant management level.

When it comes to special safety regulations stipulated in the insurance contracts or prescribed by the insurer pursuant to the insurance contract, the insurer must satisfy that such rules have in fact been given and have the required basis in the insurance contract.

If the ship springs a leak whilst afloat, the burden of proof is reversed, and the assured must then prove that no safety regulation has been breached. The word "afloat" implies that the ship is floating on its own buoyancy. The rule implies a presumption that safety regulations have been breached if the vessel springs a leak whilst afloat. The presumption will only apply, however, to casualties in the form of leaks; for other types of casualties, e.g. fire or engine casualty of unknown cause, the insurer carries the burden of proof that a safety regulation has been breached. Nor can the provision be interpreted by analogy to encompass capsizing, cf. ND 1969.436 *Gulating HEIMNES*. The application of this provision has also been dealt with in ND 1972.71 *NH ROSA*, ND 1982.194 *NH FRANK ERIK*, and ND 1986.258 *Agder LECH WALES*, and, as regards ships laid up, ND 1991.214 *NH MIDNATSOL* and ND 1991.156 *Hålogaland SOPEN*. These judgements were considering the corresponding provision in Cl. 45 of the Norwegian 1964 Plan and were deemed equally relevant to the previous Cl. 3-22 of the Norwegian 1996 Plan and the current sub-clause 3.

The presumption applies only to the question of whether safety regulations have been breached, not the question of whether or not the assured caused the breach through negligence. If the assured does not succeed in refuting the assumption of breach of safety regulations when the vessel springs a leak whilst afloat, the assured may all the same invoke the defence that he did not cause the breach through negligence. Here, the burden of proving that he has not been negligent rests with the assured, cf. sub-clause 3, *second sentence*.

The burden of proof rule is not relevant to any doubts on interpretation or application of a safety regulation. If there is any doubt or disagreement on interpretation or application of the safety

regulation, this doubt or disagreement must in the last instance be decided by the competent court (or arbitrators if arbitration has been agreed) in accordance with the ordinary principles on interpretation and application of statutes and statutory instruments applying the relevant sources of law available.

Once it is established that a safety regulation has been breached, the assured has the burden of proving that neither he nor anyone he may be identified with in accordance to Cl. 3-36 to Cl. 3-38 has been acting negligently. An isolated breach of the SMS at ship or shore level will not in itself be sufficient to establish that the assured has acted negligently, unless it is the result of a negligent failure to supervise the maintenance of and compliance with the system at the management level with which the company will be identified according to Cl. 3-36 to Cl. 3-38. The assured will also carry the burden of proof that there is no causative connection between the breach of safety regulation and the casualty.

### **Clause 3–26.    *Vesle/s* laid up**

The Commentary was amended in 2016.

The provision introduces safety regulations for ships that are laid up; the insurer may also invoke other safety regulations, in so far as they are applicable to situations where ships are laid up.

The *first sentence* imposes on the assured an obligation to prepare a plan for the lay-up and submit it to the insurer for approval. It is sufficient that the lay-up plan be forwarded to the claims leader, cf. Cl. 9-3. The assured has an obligation to comply with the approved plan.

A lay-up plan should resolve four issues: it should state where the ship is to be laid up, set out guidelines for mooring while the ship is laid up, provide guidelines for supervision of the ship, and contain rules on minimum crew. It is not necessary, however, to impose any requirement that the ship must maintain its class. In practice, the periodic class survey will be postponed for the time the ship is laid up, and the ship will be able to keep its class provided it is inspected before being operated again.

The provision concerning the lay-up plan will only be applicable when the ship is to be "laid up". Brief stays in port for the purpose of loading or unloading or bunkering will not trigger the requirement to prepare a lay-up plan. For that to happen, the ship must be taken out of operation and the crew reduced. If the ship lies in port for a while with full crew, it is not "laid up". It is virtually impossible to set a limit for how long a stay must be before it constitutes "lay-up"; sometimes a ship will abruptly end a lay-up period because it has obtained a cargo assignment.

As a rule, a lengthy stay accompanied by a request from the person effecting the insurance for a reduction in premium will constitute "lay-up".

If the assured has prepared a lay-up plan and forwarded it to the insurer, and the insurer does not respond with any objections, this will usually be taken as tacit acceptance of the plan by the insurer. The insurer may not then invoke Cl. 3-23 if the assured follows the plan during the lay-up period.

The *second sentence* prescribes the sanctions that apply if the assured fails to prepare a lay-up plan or to have it approved by the insurer, or fails to follow the lay-up plan while the ship is laid up. In such case, Cl. 3-25, sub-clause 1, will apply correspondingly. In practice, this means that unless the assured can prove that he cannot be blamed for negligence and that the casualty that occurred would have happened even if a lay-up plan had been prepared or even if the lay-up plan had been followed, the insurer is not liable for the loss sustained. As the clause only refers to Cl. 3-25, sub-clause 1, the extended identification clause in Cl. 3-25, sub-clause 2, does not apply.

### **Clause 3–27. Right of the insurer to cancel the insurance**

This Clause was amended in the 2007 version, in connection with the revocation of the former Cl. 3-22 on unseaworthiness. The provision corresponds to relevant Nordic Insurance Contracts Acts, but contains no explicit requirement that the cancellation must be reasonable in order for the cancellation to be valid.

*Sub-clause (a)* corresponds to the former sub-clause (a), but makes the insurer's right to cancel the contract contingent on the ship not being in compliance with technical and operational safety regulations, cf. Chapter 3 of the Norwegian Ship Safety and Security Act, instead of, as before, linking the assessment to the ship's seaworthiness. This rule is applicable regardless of whether any degree of blame can be attached to the assured. In practice, it mainly has significance in the case of older, poorly maintained ships, or ships in which construction defects have been discovered, as a result of which the ship cannot be considered technically and operationally safe.

The former *sub-clause (b)*, which allowed the insurer to cancel the insurance if, after a casualty, the ship has lain unrepaired for a long time and does not satisfy the seaworthiness requirements, has thus been revoked, but it now follows from sub-clause (a) that the insurer has the right to cancel if the ship, due to a casualty, is not in compliance with technical and operational safety regulations. Even if this is not explicitly stated, it is self-evident that the insurer will not have the right to cancel the insurance after a casualty if the assured, within a reasonable period of time, takes steps to have the ship repaired so that it is in compliance with the prescribed safety regulations.

*Sub-clause (b)* corresponds in full to the former sub-clause (c). Cancellation under this provision is conditional on it being a question of an intentional or grossly negligent breach of a safety regulation, and on this regulation being of material significance. It makes no difference what kind of safety

regulation it is. The insurance may also be cancelled if the breach has been committed by a subordinate of the assured, provided that it is the duty of the person in question to comply with the regulation or to ensure that it is complied with. In this connection, the regulation concerned does not necessarily have to be of the type referred to in Cl. 3-25, sub-clause 2.

The notice period for cancellation is 14 days, but cancellation may not take effect until the ship arrives at the nearest safe port. In accordance with the rules set out in Cl. 3-7, Cl. 3-14 and Cl. 3-17, it is specified that the insurer shall issue instructions regarding such a port.

### **Clause 3–28. Terms of contract**

This Clause corresponds to earlier versions of the 1996 Plan. The provision gives the insurer authority to impose safety regulations during the period of insurance, cf. Cl. 3-22, sub-clause 1. The rule is of particular significance for the hull insurer's cover of collision liability, e.g., in connection with entering into contracts of towage or contracts for calling at privately-owned quay facilities.

The sanction for breach of safety regulations issued pursuant to This Clause is expressly regulated in Cl. 4-15. The effect of the breach is that the insurer is not liable for liability which the assured may incur and which the assured would have avoided had he not entered into the contract in question. The assured will be fully identified with his employees, even though the regulation in question may not have been in effect at the time the contract was entered into.

## **Section 4**

### **Measures to avert or minimise loss, etc.**

### **Clause 3–29. Duty of the assured to notify the insurer of a casualty**

This Clause is identical to Cl. 52 of the 1964 Plan and corresponds to relevant Nordic Insurance Contracts Acts (Nordic ICAs).

Under *sub-clause 1*, the insured has a duty to inform the insurer when a "casualty threatens to occur or has occurred". The rule corresponds to Nordic ICAs, but the duty to notify under Nordic ICAs applies only when the event insured against has occurred; nor does the Nordic ICAs contain any requirement that the insurer be kept informed on an ongoing basis, as the Plan does. If there are several co-insurers, notice must be sent to each of them. However, this does not apply if a claims leader has been appointed, in which case Cl. 9-4 will apply, giving the claims leader authority to receive notice on behalf of the co-insurers.

The duty to notify is extended in *sub-clause 2* to apply to the master as well, meaning that negligence on the part of the master may be invoked under Cl. 3-31.

### Clause 3–30. Duty of the assured to avert and minimise loss

This Clause corresponds to Cl. 53 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The *first sentence* imposes on the assured a duty to avert or minimise the loss, while the *second sentence* requires the assured to consult with the insurer. The provision corresponds to Nordic ICAs, although the provisions do not contain any duty to consult with the insurer. It is somewhat superfluous to impose a duty on the assured to consult with the insurer, since it is already part of the duty to notify and the duty to keep the insurer informed of further developments under Cl. 3-29. The provision serves as a good signal, however, and has, accordingly, been maintained.

In the 1964 Plan, the duty of the assured to act was formulated as encompassing "what he can" do to avert and minimise the loss. In accordance with Nordic ICAs, this wording has been replaced with "what may reasonably be expected of the assured".

The duty to take measures to avert or minimise the loss will be present when there is an impending danger of a casualty occurring, and when the loss is to be minimised after the situation has been brought under some degree of control.

Under Cl. 53, third sentence, of the 1964 Plan, the assured was under a duty to comply with the requirements imposed by the insurer, unless the assured ought to have known that they were based on incorrect or insufficient information. This provision has been deleted because it raised the possibility of difficult conflicts of interest between the assured and the insurer, and possibly also between insurers *inter se*. For example, a situation could be envisaged where the ship had small cracks in the cylinder liners or other minor damage which did not make the ship unseaworthy, but which nonetheless had to be repaired. Under Cl. 53, third sentence, the loss-of-hire insurer could require that the shipowner request a seaworthiness certificate and continue to sail to avoid loss-of-hire. On the other hand, the shipowner would have a clear interest in having the repair carried out at once, particularly if he had a high daily indemnity under the loss-of-hire insurance. If there was a danger that the cracks could develop and cause a casualty, then the hull insurer would also have an interest in having repairs carried out promptly. The assured could then find itself in the position of receiving conflicting requirements from different insurers, a most unfortunate situation. Moreover, circumstances such as these should really be assessed under the rules in Cl. 3-22, and it would be unfortunate if the insurer could instead use Cl. 3-30 as authority to impose requirements on the assured.

A situation can be envisaged where the insurer needs to give separate instructions, e.g., in connection with salvaging the ship. Special rules are not needed for this; it is implicit in the requirement that the assured listen to the recommendations of the insurer. If the assured chooses to take other action which

later turns out to be less expedient, there is the risk that he will be judged to have acted with gross negligence pursuant to Cl. 3-31.

In a conflict of interest between the assured and the loss-of-hire insurer as to whether the ship is so damaged that it cannot sail, the view of the classification society will usually be determinative. If the classification society is in doubt and different experts have divergent views on the matter, then the assured must make a decision based on what he believes is best in light of all of the interests involved.

Under Cl. 5-21, the duty to avert and minimise the loss continues after the object insured has been taken over by the insurer, if the insurer does not himself have the opportunity to take care of its interests.

### **Clause 3-31. Consequences of the insured neglecting his duties**

This Clause corresponds to Cl. 54 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

If the assured neglects his duty to report a casualty under Cl. 3-29 or implement measures to avert or minimise the loss under Cl. 3-30, the insurer shall be free from liability for loss which would not have occurred if the assured had fulfilled his obligations, cf. *sub-clause 1*. The sanction threshold is the same as in the Nordic ICAs, although the sanction is different. The Nordic ICAs use a sliding scale, while the Plan starts with the principle that the insurer shall not cover loss resulting from the negligence. Even though the basic approach during the Plan revision has been not to switch to sliding scale rules patterned on the Nordic ICAs, consideration was given to whether it would lead to greater consistency in the Plan rules generally if a system similar to that in Nordic ICAs was to be adopted, cf. Cl. 3-33. The conclusion was that the existing system should be maintained.

Under Cl. 54, sub-clause 1, last sentence, of the 1964 Plan the assured had a duty to compensate loss sustained by the insurer as a result of the negligence. the Nordic ICAs contain no such rule, and it has therefore been deleted. This means that the insurer may only set off his expenses against the assured's claim for indemnity, and not claim compensation from the assured.

*Sub-clause 2* makes it clear that it is only in the event of breach of the duty to notify under Cl. 3-29 that negligence by the master has any significance.

## Section 5

### Casualties caused intentionally or negligently by the assured

The rules in this Section deal with cases where a casualty has been caused by an intentional or negligent act of the assured. The rules are virtually identical to the provisions in the 1964 Plan: intentional acts of the assured are dealt with in Cl. 3-32, while Cl. 3-33 deals with gross negligence. There is no rule that deals in general terms with cases where the insured event is caused by ordinary negligence on the part of the assured. The insurer thus remains entirely liable for the loss. This concords with the relevant Nordic Insurance Contracts Acts.

Sections 3 and 4 also deal with negligence on the part of the assured, but the rules in those Sections regulate cases where the negligence of the assured relates to certain specific obligations, namely, negligent breach of safety regulations and gross negligence in breach of the duty to notify and to take measures to avert or minimise the loss. When the rules in this Section are applied to an event which has been caused by the negligence of the assured, the question is not one of whether there has been a breach of a special obligation. Instead one must consider whether the assured's conduct generally was grossly negligent in relation to the occurrence of the damage.

#### **Clause 3–32. Intent**

This Clause is identical to Cl. 55 of the 1964 Plan and corresponds to the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The provision confirms the traditional principle in insurance law to the effect that the insurer is not liable if the assured has intentionally brought about the event insured against. The Norwegian ICA Section 4-9, first paragraph, second sentence, has relaxed the principle somewhat by allowing for partial liability if the conduct has been intentional but without fraudulent intent. The provision reflects a wish to protect the person effecting the insurance, and is not applicable to marine insurance.

The question of whether the assured acted intentionally must primarily be considered in the same manner as in criminal law. Intent will be present when the assured deliberately brings about the casualty so as to receive indemnity under the insurance contract, i.e. fraudulent intent, and when the assured realises that his conduct will, on a balance of probabilities, bring about the casualty. The concept of intent will also encompass the situation where the assured foresaw the occurrence of the casualty as a possible consequence of his conduct and accepted the risk of that consequence (i.e. was willing to accept it as part of the bargain).

### Clause 3–33. Gross negligence

This Clause is identical to Cl. 56 of the 1964 Plan and corresponds to the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The Clause regulates cases where the assured brings about the casualty through gross negligence. Gross negligence lies somewhere between ordinary negligence and intent. Ordinary negligence occurs when the assured has not acted as a competent and reasonable person would have done in an equivalent situation. Gross negligence is a more specific form of negligence: the deviation between the conduct of the assured and the relevant norm is more pronounced. In case law, the courts have found gross negligence in the following cases: ND 1971.350 NH KARI-BJØRN, ND 1976.132 Gulating TUVA, and ND 1977.138 OSLO.

Both the Plan and the Nordic ICAs apply a progressive reduction of the insurance cover when the casualty has been caused by gross negligence. The Norwegian ICA Section 4-9, second paragraph, sets out a number of factors which are to be specifically taken into account in assessing the reduction: the degree of fault, the course of events relating to the damage, whether the assured was in a state of self-induced intoxication, and circumstances generally. Cl. 3-33 of the Plan refers simply to "the degree of fault and circumstances generally". "Circumstances generally" is such a wide-ranging expression that it includes the other factors listed in the relevant Nordic ICAs. In deep-water hull insurance, it will be especially the "course of events relating to the damage" which will be of significance for the reduction of the insurer's liability. The factor of "self-induced intoxication" is more relevant to coastal hull insurance, but can also become relevant for deep-water hull cover, especially if there has been a delegation of the ship owning functions which entails that the assured must be identified with the ship's captain or officers, cf. Cl. 3-36. "Intoxication" means that intoxicating substances have influenced the user in such a way that he or she acts in a way other than would have been the case had he or she not consumed the intoxicating substances. It is not possible to link the definition of "intoxication" to a set alcohol percentage in the blood, as is done, for example, in Section 22 of the Norwegian Road Traffic Act (*veitrafikkloven*). A review must be made in each case of the effect of the intoxicating substance on the individual to determine whether the assured acted while intoxicated. It is thus possible to be "under the influence" within the meaning of the Road Traffic Act without being "intoxicated" within the meaning of the Plan.

If one of the subordinates of the assured, be it someone in the shipowner's management staff or one of the people on board, has caused the casualty through an error which must be deemed gross negligence, a decision must be made using the rules in Chapter 3, Section 6 of the Plan as to whether the insurer may invoke the error against the assured. Errors committed by the master or crew in their service as seamen on the insured ship can never be invoked by the insurer, cf. Cl. 3-36, sub-clause 1. Moreover, the result will depend on whether decision-making authority has been delegated in areas which are of

material significance for the insurance, cf. Cl. 3-36, second sub-clause. Cases where the error has been committed on board another of the assured's ships than the one covered by the insurance, are dealt with under the "sister ship rule" in Cl. 4-16.

In cases where the owner works as master or a member of the crew on board, it was assumed on page 59 of the Commentary on the 1964 Plan that the courts would take account of the special position of the assured in their application of the discretionary scaling-down provided for in Cl. 56 of the 1964 Plan relating to gross negligence. The assured was thus to be awarded full or nearly full indemnity when there was no reason to suspect that the casualty was intentionally brought about. This assumption has been used in practice: see, for example, ND 1971.350 NH KARI-BJØRN; and the intention has been to maintain this approach in the Plan.

If the assured has brought about the casualty through ordinary negligence, the insurer will always be fully liable, cf. the corresponding rule in the relevant Nordic ICAs. This will not apply, however, when the negligence can be brought under the scope of other rules, e.g., the rules on breach of safety regulations. In cases where the gross negligence has related to a breach of a safety regulation, the courts have had a tendency in connection with insurance for small vessels to apply the rules on gross negligence instead of the rules on breach of safety regulations. The rationale has probably been that the rules on gross negligence offer the possibility for a discretionary reduction of cover, while the sanction for breaching a safety regulation is loss of cover in its entirety. It would be unfortunate if the same sort of tendency were to spread to deep-water hull insurance.

### **Clause 3–34. Right of the insurer to cancel the insurance**

This Clause corresponds to Cl. 57 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

*Sub-clause 1, first sentence* gives the insurer the right to cancel the insurance without notice if the assured has intentionally brought about or attempted to bring about the event insured against, while the *second sentence* sets the period of notice at 14 days if the assured has brought about the casualty through gross negligence. The provision in sub-clause 1 is unmodified, apart from the seven-day notice period for gross negligence being increased. The period of notice in the first sentence, which in reality allows for an element of punishment, has been maintained, even though the Nordic ICAs have no special rules for this type of situation.

The provision in *sub-clause 2* is new, and gives the insurer an expanded right of cancellation if the assured intentionally brings about the casualty: the insurer may cancel all insurance arrangements with the assured. This corresponds to the rule on fraudulent breach of the duty of disclosure, cf. above regarding Cl. 3-2, second sub-clause; the rationale is the same.

### **Clause 3–35. Circumstances precluding the application of Clauses 3–32 to 3–34**

This Clause corresponds to Cl. 58 of the 1964 Plan And the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The provision lists a number of cases where the assured will not lose cover despite having brought about the casualty intentionally or negligently. The 1964 Plan also contained a sub-clause (c), which only became relevant for war risks insurance and which has been deleted as it was unnecessary.

*Sub-clause (a)* applies when the assured has a mental disorder or is otherwise incapable of judging his own actions. The provision corresponds to the Norwegian ICA Section 4-9, fifth sub-clause, although the formulation is somewhat different.

An exception from sub-clause (a) will nonetheless apply if the abnormal state of mind is due to "self-induced intoxication". This type of rule is necessary to make it clear that self-induced intoxication is never an excuse. In addition, as mentioned under the Commentary on Cl. 3-33, self-induced intoxication can have consequences for the assessment of whether there has been gross negligence, and for the discretionary reduction of liability.

*Sub-clause (b)* corresponds to the Norwegian ICA Section 4-13, but is formulated somewhat differently due to the reference to Cl. 3-12. The reference means that the assured has an unconditional right to expose the object insured to any peril for the purpose of saving human life, and that, "during the voyage" the assured may risk the object insured for the purpose of salvaging goods of material value. In the latter case, of course, one must consider the nature of goods the assured attempted to salvage when deciding whether or not the action was justifiable. The thing the assured attempted to salvage must normally have a fairly substantial value. But if the assured was under a pardonable delusion, the action must be accepted.

Under general legal principles, the insurer will have a right of recourse against the owner (insurer) of the goods that benefited from the salvage. If the ship sustains damage to salvage its own cargo, the insurer will have a right of recourse against the goods owner (goods insurer) if the shipowner would not have been liable for the damage to the cargo. In these types of situation, the action will usually be aimed at saving both vessel and goods, in which case the rules on general average in Chapter 4, Section 2, will come into play.

A relevant provision in this connection is Cl. 4-12, sub-clause 2 of this Plan, which sets out the rules to be applied when the assured has taken measures to avert or minimise the loss which are aimed simultaneously at averting loss for more than one of his insurers.

## Section 6

### Identification

#### General remarks

The rules on the duty of disclosure and duty of care are aimed directly at the person effecting the insurance and the assured, respectively. However, there will often be other persons who act on behalf of the person effecting the insurance or the assured. The person effecting the insurance and the assured will often be different people or companies, and there may also be several assureds covered under one insurance contract. The difficult question which then arises is to what extent the insurer may invoke against the person effecting the insurance or the assured, errors or negligence committed by someone else, i.e. to what extent are the assured and the person effecting the insurance to be identified with their helpers, employees etc.

The issue of identification must, in principle, be kept separate from the issue of who is the person effecting the insurance or the assured. If a limited liability company is stated as being the person effecting the insurance or the assured, actions taken by the management (Board of Directors/Chief Executive Officer) of that company will be deemed to be actions of the company itself; the company management *is* the company. By contrast, the issue of whether action taken by other persons in the company can prejudice the position of the company is one of identification; those employees *are not* the company.

Problems of identification in marine insurance arise in four different relationships:

#### **1. Identification between the person effecting the insurance and his servants**

The 1964 Plan contained no direct regulation of the issue of identity between the person effecting the insurance and his servants, although Cl. 61 had a general reference to "general rules of law" with respect to problems of identification which were not directly regulated in the Plan. The rule also applied to identification between the person effecting the insurance and his servants.

Identification between the person effecting the insurance and his servants is not regulated in the relevant Nordic Insurance Contracts Acts (Nordic ICAs), either, although the Commentary states that general principles of contract law are to apply.

During the revision, there was agreement that the issue of identification between the person effecting the insurance and his servants was not to be regulated specifically in the Plan. In marine insurance, this problem will arise particularly when the insurance contract is entered into through a broker, and then primarily in the area of the duty to disclose, cf. Cl. 3-1; for further details, see the Commentary on that provision. The main rule is that the person effecting the insurance must simply accept that he

will be identified with the broker; if the broker makes a mistake during the conclusion of the contract, for example, by not forwarding information from the person effecting the insurance to the insurer, then the person effecting the insurance will have to bear any consequences that follow.

In all other respects, the issue of identification between the person effecting the insurance and his servants must be resolved according to general principles of contract law. The starting proposition is that if the person effecting the insurance uses an agent during the conclusion of the contract, there will be full identification between the person effecting the insurance as principal and the agent. This will apply regardless of whether it is an employee from the organisation of the person effecting the insurance who enters into the contract with the insurer (internal identification), or whether the contract is entered into by an organisation other than the shipowner, e.g., charterer's organisation (external identification).

## **2. Identification between the assured and his servants**

In the 1964 Plan, identification between the assured and his servants was regulated generally in Cl. 59 with respect to the ship's master and crew. The Plan also contained special rules, for example Cl. 18, sub-clause 2, Cl. 49, sub-clause 2 and Cl. 52, sub-clause 2. In addition, Cl. 175 on limitation of liability for damage resulting from inadequate maintenance, etc., meant that the assured had to accept that his position would be affected if the master or crew were responsible for lack of maintenance. In other cases, it became necessary to fall back on the reference to general rules of law in Cl. 61.

The relevant Nordic Insurance Contracts Acts contain a complete regulation of these matters, applies to commercial insurance, and opens up the possibility of identification with specified persons or groups, provided they are stated specifically in the contract. This means that in marine insurance of merchant ships, one is free to regulate the issue of identity in the insurance conditions. The Nordic ICAs assume, however, that no identification may take place beyond what is stated in the contract. Consequently, there can be some doubt in marine insurance as to how far identification can be taken if it is not specifically regulated in the insurance conditions.

During the Plan revision, there was agreement that the specific rule on the crew and master in Cl. 59 of the 1964 Plan should be retained, see Cl. 3-36, sub-clause 1 of the new Plan. At the same time, the broad reference to general rules of law in Cl. 61 of the 1964 Plan is no longer sufficient. Given the current regulation in Nordic ICAs, it is uncertain whether there are any "general rules of law" on the matter anymore. Accordingly, the Plan must go further in setting out which servants the assured must accept that he will be identified with. Cl. 3-36, sub-clause 2, attempts to resolve this.

### 3. Identification between the assured and the person effecting the insurance

The issue of identification between the assured and the person effecting the insurance was not regulated explicitly in the 1964 Plan, but the Commentary stated that there was to be full identification between the assured and the person effecting the insurance in areas where sanctions were linked to negligence on the part of the person effecting the insurance (duty of disclosure/premium). In addition, Cl. 129 contained a specific rule for situations where the object insured was in the custody of the person effecting the insurance: the rules on the duties of the assured then applied to the person effecting the insurance, and a co-insured third party was to be identified with the latter.

In the Norwegian Insurance Contracts Acts (ICA) the starting premise is the opposite: there is to be no identification between the assured and the person effecting the insurance. Exceptions are possible, however.

During the Plan revision, there was a wish to retain the 1964 Plan solution on this point. Since the Norwegian ICA now has another approach, it was found most expedient to incorporate express authority for identification on this point as well, cf. Cl. 3-38. Co-insured third parties are covered by the references in Cl. 7-1 and Cl. 8-1 of the 1996 Plan.

### 4. Identification of assureds *inter se*

The 1964 Plan had no general rule governing the relationship between assureds, although Cl. 60 contained a rule on identification between the assured and co-owners of the insured ship. In addition, Chapter 7 (primarily Cl. 129) and Chapter 8 (primarily Cl. 134, sub-clause 1) contained rules on identification between the assured and third parties and mortgagees, respectively. The issue of identification, in other cases, had to be resolved through a reference to general rules of law as provided for in Cl. 61.

The relevant Nordic Insurance Contracts Acts (Nordic ICAs) have solved the identification problem by taking as a starting point that co-assureds are not to be identified with each other, although some exceptions are also possible here.

As mentioned earlier, since the new Norwegian ICA has come into force, some uncertainty prevails as to what general rules of law are. Accordingly, during the Plan revision it was necessary to undertake a general regulation of identification between assureds. The decision was made to group the relationship of assureds *inter se* and between the assured and co-owners under a common rule, see Cl. 3-37. This approach implies that the provision also regulates the relationship between the party who has the decision-making authority for the operation of the ship and a mortgagee or other co-insured third party. To prevent any possible misunderstanding references to the rules governing identification have been made in Cl. 7-1 and Cl. 8-1.

### Clause 3–36. Identification of the assured with his servants

This Clause corresponds to Cl. 59 and Cl. 61 of the 1964 Plan. The Commentary on the first sub-clause was amended in the 2010 version.

*Sub-clause 1* sets out the important principle that there shall be no identification with the master or crew in respect of faults or negligence committed "in their service as seamen". The provision corresponds to Cl. 59 of the 1964 Plan. The background for the provision is that faults or negligence committed by the master and crew are one of the risks for which the shipowner should have unconditional marine insurance cover. The wording "faults or negligence ... in connection with their service as seamen" indicate the contrast with errors touching on the commercial functions which the ship's master may sometimes carry out on behalf of the shipowner. Identification issues with respect to commercial errors must be resolved using the general rule in sub-clause 2. The crucial factor will then be whether the master or crew have been given decision-making authority in matters of material significance for the insurance. However, insofar as the error is committed "in connection with their service as seamen", it is of no import whether it is the master or the crew who have been entrusted with the authority. For example, if, pursuant to Section 19 of the Norwegian Ship Safety and Security Act, a number of duties have been imposed on the master with regard to ship safety, he shall, among other things, ensure that the ship is loaded and ballasted in a safe and proper manner, that the ship has safe and proper watchkeeping arrangements and that the navigation of the ship and the keeping of ship's books are done in accordance with statutory and regulatory requirements. Negligence relating to such duties is regarded as a "fault committed in connection with service as a seaman", which means that there will not be identification with the master and the crew. The same will apply if authority has been delegated to the master in relation to implementation of safety regulations, unless the specific identification rule in Cl. 3-25, sub-clause 2 applies. Faults and negligence relating to delivery of cargo in a general average situation are discussed in greater detail in the Commentary on Cl. 5-16.

Technological advances have brought a steady improvement in possibilities for communication between the shipowner's organisation on land and personnel on board. As long as the master or crew have acted according to instructions from the organisation on land or with its consent, any error or negligence must be assessed as though it was committed by the organisation on land itself. If the insurer does not manage to provide the proof to the contrary, it must be assumed that the error or negligence has been committed by the people on board.

The provision applies to any insurance taken out under Plan conditions, and thus also includes war risks insurance. Errors on the part of the crew will normally be judged to be a marine risk, making the issue of identification under a war risks insurance less relevant. However, if an error on the part of the crew must be judged as an element of war risk because the error is very closely associated with the

war risk or consists in a misjudgement of this risk, cf. above under Cl. 2-9, the question of identification in relation to the war risk insurer as well will arise.

*Sub-clause 2* of Cl. 3-36 corresponds to Cl. 61 of the 1964 Plan. While the latter provision applied to both the relationship between the assured and his servants and the relationship between the person effecting the insurance and his servants, sub-clause 2 of Cl. 3-36 only aims to regulate the relationship between the assured and his servants, cf. the wording "against the assured".

The provision states that the assured shall be identified with "any organisation or individual to whom the assured has delegated decision-making authority concerning functions of material significance for the insurance, provided that the fault or negligence occurs in connection with the performance of those functions". The purpose of the provision is to state what is regarded as established law by specifying in somewhat more detail how far identification is carried in current marine insurance. There is no intention to introduce any material changes to the rules that have applied so far.

The criterion for identification is that decision-making authority has been delegated "concerning functions of material significance for the insurance". Delegation of decision-making authority denotes the power to act on behalf of the assured in the area in question. Authority will usually be indicated on the organisation chart, but this is not a condition. Nor is there any requirement that the power has been delegated expressly. *De facto* delegation is sufficient if the organisation or person in question in reality has the crucial decision-making authority.

Whether the delegation involves "functions of material significance for the insurance" must be determined in each individual case. It was not believed expedient to attempt to set out precisely which persons or organisations the assured is to be identified with. Ship operations are organised in a wide variety of ways, ranging from limited partnerships in which the owners are not involved in operations at all and have organised everything in separate companies, to large, professional shipping companies which take care of all or most operational functions. There are also big differences in how operational responsibility is placed internally in individual companies. Most shipowners have a central operational organisation on land, but some have a small land-based organisation with wide-ranging powers delegated to the superintendent level. In some cases, there may also be shipowners with a small land-based operational organisation or none at all, where the captain is given wide-ranging powers in relation to the operation of the ship. This need not be blameworthy: modern management philosophy places great emphasis on decentralisation of the management function, and in some cases it may be natural to make the ship's officers part of the management. One consequence of this is that it becomes impossible to make a general rule that there shall (or shall not) be identification with certain groups of persons or companies.

The criterion for identification in sub-clause 2 is based on the view that the shipowner must be free to organise ship operations as he sees fit, but that the assured must bear the consequences of the management model chosen. If the assured chooses to delegate a large portion of the management to others, the assured must also accept responsibility for faults or negligence committed by the organisations or persons in question within the area of authority they have been given. The determining factor in relation to identification then becomes who has real authority in areas which are of significance for the insurance. "Functions of material significance for the insurance" refers to all types of management function regardless of whether they are grouped together or exist separately. If the operations are organised through a separate management company or similar entity which has the overall responsibility for the ship's technical/nautical and commercial operation, then of course the assured must be identified with the manager. Likewise, if the management function is divided into technical, nautical and commercial operations, there must be identification in relation to the person who has been given responsibility for the different functions, insofar as these functions are of material significance for the insurance. The same will be true for the person or company who is responsible for crewing.

If the individual management function is split up as well, it becomes more difficult to pinpoint what will trigger identification. On the one hand, it is clear that the assured may not avoid liability by dividing up management functions into as many units as possible. Here, as elsewhere, the assured must take responsibility for the management model chosen. On the other hand, not each and every element of the management responsibility will constitute a basis for identification, for example, if a subordinate employee in the company is given responsibility for an operational function on one occasion. The borderline for identification in these types of cases must be drawn based on practice under the 1964 Plan. As mentioned earlier, the intention is not to open the door to a greater degree of identification than is usual practice today, but rather to try and set out somewhat clearer guidelines. Accordingly, the approaches adopted in case law in recent years must stand. In ND 1973.428 NH HAMAR KAPP-FERGEN, the company was identified with its manager and general manager who, on behalf of the company, were to arrange for the ship to be laid up and for supervision during the lay-up period. The same approach was adopted in ND 1991.214 MIDNATSOL, where the holding company was identified with a board member/assistant who had authority to arrange for supervision while the ship was laid up for refitting.

Identification applies in relation to "organisations or individuals". The provision thus encompasses identification both externally and internally, although the most relevant in practice is external identification. External identification refers to all cases where authority of importance for the insurance is entrusted to organisations other than the assured's own, e.g. where one or more central operational functions are transferred to other companies.

Internal identification refers to cases where the assured must be identified with those persons in his own organisation who have authority to make decisions concerning matters which are important for the insurance. This implies that whether or not there is identification is a relative matter: a technical inspector will not usually have sufficient authority for him to be identified with the assured, but it is possible if the land-based organisation is limited in certain areas.

The provision must also be read in relation to sub-clause 1 with respect to internal identification. The starting premise in relation to the master and crew is that there shall be no identification in respect of faults or negligence committed in connection with their service as seamen, cf. above. The approaches which have crystallised in practice under Cl. 59 of the 1964 Plan will thus set a limit for the application of Cl. 3-36, sub-clause 2, of the new Plan. There will not usually be identification with the master or crew in other areas, either, although exceptions may be envisaged where the shipowner has no land-based organisation having authority for the area in question, and has thus left management functions of material significance for the insurance with the captain. In that case, it would seem obvious that the shipowner must be identified with the captain to the extent he or she makes mistakes in the performance of those functions.

Another condition for identification is that the error be committed in connection with the exercise of the delegated authority. cf. the wording "provided that the fault or negligence occurs in connection with the performance of these functions". This means that it is necessary to distinguish between faults or negligence committed in the exercise of the delegated authority, and faults or negligence committed in the performance of other tasks. The assured must accept being identified with a senior employee who has responsibility for organising supervision for a laid-up ship and if the employee is at fault, cf. ND 1973.428 NH HAMAR KAPP-FERGEN. There will not be identification, however, if the same employee commits an isolated error while personally carrying out supervision, cf. ND 1973. 428 NH HAMAR KAPP-FERGEN, where the Supreme Court left the question open. In other words, identification presupposes that the error is committed during the performance of management functions on behalf of the assured.

Moreover, identification will only arise in the relationship between the assured who has responsibility for the operation of the ship and the party to whom the assured hands over decision-making authority. The provision does not resolve the issue of identity between a mortgagee or other co-insured third parties and the assured who is responsible for the operation of the ship. In other words, identification applies only downwards in the organisational hierarchy linked to the operation of the ship, and not laterally among several parties because of their status as assureds under the insurance contract. Identity between assureds is regulated in Cl. 3-37. On the other hand it follows from the provision that delegation of the kind referred to in Cl. 3-36 also has effect in relation to other assureds, cf. below.

As mentioned earlier, the purpose of Cl. 3-36 is to continue the approach taken under the 1964 Plan. The intention is not, however, to "freeze" development. The provision is aimed at resolving the questions which have been relevant under the 1964 Plan and which have been raised during the revision. Development may lead to other types of identification problems arising than those referred to, which might make some modification of the rules necessary.

### **Clause 3–37. Identification of two or more assureds with each other and of the assured with a co-owner**

This Clause corresponds to Cl. 60, Cl. 129 and Cl. 134, sub-clause 2 of the 1964 Plan.

The provision regulates faults and negligence committed by the assured or co-owners of the insured ship and, to a certain extent, brings together and expands on Cl. 60, Cl. 129 and Cl. 134, sub-clause 2 of the 1964 Plan. It also has its counterpart in relevant Nordic Insurance Contracts Acts (Nordic ICAs).

Unlike Cl. 3-36, which concerns identification between the assured and his servants, Cl. 3-37 regulates the issue of identification between several assureds, and between the assured and co-owners of the ship.

The provision deals with the issue of identification in relation to any assured, cf. the wording "against the assured". It makes no difference what kind of right in the ship provides the basis for acquiring status as an assured. The provision thus encompasses Cl. 60 of the 1964 Plan, which regulated identification in relation to insured co-owners, Cl. 129, which regulated identification in relation to co-insured third parties, and Cl. 134, sub-clause 2, which regulated identification in relation to mortgagees. The approach in relation to mortgagees and other co-insureds has been retained as a matter of form through references in Cl. 7-1 and Cl. 8-1.

The starting point for the first sentence is that there is to be no identification in respect of faults or negligence of "another assured or co-owner of the insured ship". The phrase "another assured" must be read as referring to any other assured than the assured who is claiming under the insurance contract. The phrase "co-owner" refers to another owner than the insured owner; in relation to a co-insured mortgagee the rule must be read as referring to any owner. The special rule governing faults or negligence of the assured's "co-owners in the insured ship" is necessary because the owner/co-owner might not be an assured. This can happen when the shipowner is organised as a shipping partnership or a limited partnership and where the company, as opposed to the co-owners, are listed as assured. Faults or negligence on the part of a co-owner will not then be those of the assured.

The purpose of the basic rule is to protect all (other) assureds in cases where the fault or negligence is committed by a co-owner or an assured who does not have overall decision making authority in relation to the operation of the insured ship, cf. the second sentence regarding identification if the party concerned has such authority. It would be quite extraordinary and unusual for a co-owner/co-assured who does not have such authority to intervene in the operation of the ship and it does not seem reasonable that the other assureds should suffer for faults he might commit in such a situation.

On the other hand if the other assured or co-owner is the person with ultimate authority in relation to the insured ship, then identification shall apply in relation to other assureds, cf. the second sentence. The rule is a generalisation of the rule in Cl. 60 of the 1964 Plan which applied to faults and negligence on the part of the assured's co-owners only. Cl. 60 only applied directly to the assured. However, the same result applied for mortgagees since Cl. 134, sub-clause 2 provided that the mortgagee should be identified with the owner. In relation to other co-assureds, the rule in Cl. 37 replaces the rule in Cl. 129 of the 1964 Plan which provided that they were to be identified with the person effecting the insurance if the vessel was in his custody.

The criterion for identification is that the assured or co-owner has "decision-making authority for the operation of the ship". The criterion is taken from Cl. 60 of the 1964 Plan, but there the requirement was that the co-owner be a "manager". The wording "decision-making authority for the operation of the ship" means the ultimate decision-making authority for the ship. Unlike Cl. 129 of the 1964 Plan, there is no requirement that the error be committed by someone who has the ship in his or her "custody". The relevant authority will often be with the owner, cf. the rule in Cl. 134, sub-clause 2 of the 1964 Plan, but this is not necessarily the case. The crucial factor will be who has the ultimate authority to decide how the operation is to be organised and resources allocated. When persons or organisations with that authority commit a fault it is natural that there be identification in relation to all assureds: the assured or co-owner responsible has been charged with taking care of the interests of the group and has been entrusted with the formal competence to act on behalf of all. As regards the co-owner, this type of approach is also necessary to avoid a situation where the organisational form of the shipowner is the determining factor in the identification issue. Parties having status as assureds should all be in the same position, regardless of whether the shipowner is organised as a limited liability company and leaves the management to a manager, or there is a holding company in which one of the partners is responsible for the operation of the ship.

Unlike Cl. 3-36, which deals with cases where several person or organisations may have been given authority resulting in identification downwards through the organisational hierarchy, the decision-making authority under Cl. 3-37 is concerned with the situation where one person or organisation has the overall or ultimate authority. If operational responsibility is shared, the crucial factor will be who has organised the division, and who has the ultimate responsibility for allocation of resources between the persons or organisations responsible.

The identification provision in Cl. 3-37 must be read in light of Cl. 3-36. If an assured who has the overall decision-making authority for the operation of the ship delegates authority to other organisations or persons, that assured must accept being identified with them provided that the conditions under Cl. 3-36, sub-clause 2, are met. At the same time, each of the other assureds must accept being identified with the assured who has decision-making authority pursuant to Cl. 3-37. There must also be identification pursuant to Cl. 3-37 when the fault was not committed by the person exercising the authority himself, but by a party with whom he must be identified pursuant to Cl. 3-36. This means that there will be identification with all assureds in all cases where errors are committed by persons or organisations who have authority in relation to functions of importance for the insurance and the conditions for identification under Cl. 3-36, sub-clause 2 are fulfilled.

The connection between Cl. 3-36, sub-clause 2 and Cl. 3-37 relates *prima facie* only to assureds and not to co-owners, since the provision in Cl. 3-36 only regulates identification between the assured and his servants. If, however, a situation were to arise where the co-owner had decision-making authority for the operation of the ship, including authority to delegate authority to others, then it would be natural to apply Cl. 3-36, sub-clause 2, by analogy so that the owner in question is identified with his servants/helpers who have committed the fault. Any other approach would give rise to a fortuitous advantage for the other assureds.

It is sufficient for identification under Cl. 3-37 that an assured or co-owner has the necessary overall decision-making authority. Unlike Cl. 3-36, Cl. 3-37 does not require that errors of the person responsible occur in connection with the exercise of the authority in question. This difference becomes particularly evident if the person or organisation responsible makes a mistake in a connection other than the exercise of authority which is of material significance for the insurance cover. In that case, there will not be identification under Cl. 3-36, but there may be identification under Cl. 3-37 if the person or organisation committing the error has overall responsibility for the operation of the ship. This approach concords with Cl. 60 of the 1964 Plan, under which it was sufficient that the co-owner in question was "the ship's manager"; there was no requirement that the person or organisation was acting within its sphere of authority.

### **Clause 3–38. Identification of the assured with the person effecting the insurance**

As mentioned earlier, the 1964 Plan contained no rules on identification between the person effecting the insurance and the assured. However, the system of the Plan did provide that there was to be full identification between the person effecting the insurance and the assured, an approach that has been retained in the new Plan. Negligence that might be committed by the person effecting the insurance would relate primarily to the duty to give correct information and to pay the premium. Negligence relating to these matters may be invoked against anyone insured under the contract. The same will

apply if the negligence is committed by a servant of the person effecting the insurance, for example, an agent charged with the task of entering into the agreement with the insurer on behalf of the person effecting the insurance. This is not stated explicitly, but follows from general rules of contract law.

The assured also has a duty of disclosure in one situation, cf. Cl. 8-2 concerning third parties who are expressly named in the insurance contract. In that case, however, there will not be automatic identification in relation to the other assureds if this one assured breaches his duty of disclosure, cf. Cl. 8-2, sub-clause 2. Identification of this type will only take place if the criteria stated in Cl. 3-37 are met, i.e. that the named co-assured is the party who has overall decision-making authority for the operation of the ship.

The relationship to mortgagees and other co-insured third parties is dealt with through the references in Cl. 7-1 and Cl. 8-1.

## Chapter 4

### Liability of the insurer

#### General

Chapter 4 contains a number of general rules relating to various forms of loss which are covered by the insurer. The rules are not exhaustive, and must in each type of insurance be co-ordinated with the provisions contained in the special parts of the Plan and in the relevant insurance contract. Generally speaking, the rules which are relevant to more than one of the various branches covered by the Plan have been compiled in this Chapter, while provisions that are relevant to only one branch are dealt with in the special parts of the Plan.

Under Cl. 2-11, sub-clause 1, the insurer is liable “for loss incurred when the interest insured is struck by an insured peril during the insurance period”. This means that in the event of a casualty occurring as a result of a peril covered by the insurance, the insurer is liable for any loss that is not explicitly excluded from cover. However, it must be emphasised that this does not mean that each and every loss is recoverable provided that there is a causal relation between the loss and a peril covered by the insurance. The Plan contains a number of provisions relating to losses that are not recoverable, and these provisions must, depending on the circumstances, also be applicable by analogy. In cases of doubt, the solution must therefore be found through an interpretation of the rules of the Plan relating to the scope of liability, supplemented by other sources of law, in particular the legal tradition in marine insurance law.

## Section 1

### General rules relating to the liability of the insurer

#### Clause 4-1. Total loss

This Clause is identical to Cl. 62 of the 1964 Plan.

The provision establishes the traditional principle in insurance law that the assured, in the event of a total loss, is entitled to claim the sum insured, however, not in excess of the insurable value. In the event of a total loss, the insurer's liability is thus subject to a double limitation: it can neither exceed the sum insured nor the insurable value. The sum insured is the amount for which the interest is insured, and on the basis of which premium is calculated. The sum insured does not, however, say anything about the value of the interest insured; this value is determined by the "insurable value". The insurable value is set at the full value of the interest at the inception of the insurance, cf. Cl. 2-2, or by agreement between the parties about the agreed insurable value, cf. Cl. 2-3. Normally, the insurable value will have been agreed and will be identical to the sum insured, cf. Cl. 2-2, sub-clause 2. In that case the insurer will, in the event of a total loss, pay the valuation amount.

However, it is important to keep the concepts of sum insured and insurable value apart in the insurance contract, and the insurance contract should therefore specify both the insurable value and the sum insured. If only one value is given, for example, a "sum insured", this may create uncertainty as to whether this value shall apply both as the agreed insurable value and as the sum insured, or whether the intention is merely to state the sum insured. In the latter event, the sum insured must be evaluated in relation to an open insurable value under Cl. 2-2. This will entail under-insurance (with a pro-rata reduction of the compensation) if the insurable value is higher than the "sum insured", cf. Cl. 2-4, and over-insurance if the "sum insured" is higher, cf. Cl. 2-5. However, in hull insurance for ocean-going vessels it is presumed that where only one value is given in the insurance contract, the intention is to state both the agreed insurable value and the sum insured.

The question as to what events will entitle the assured to compensation for total loss must be resolved in the conditions for the special types of insurance. In hull insurance the question also arises as to what will happen when the ship, before it becomes a total loss, has sustained damage which has not been repaired. This matter has been resolved in Cl. 11-1, sub-clause 2, cf. also Cl. 5-22.

Total losses occur only in those types of insurance that cover an asset belonging to the assured (hull insurance, freight insurance). In a situation where the insurer covers the assured's future obligations (cover of collision liability under the hull insurance), it will merely be a question of the liability of the insurer being limited to the sum insured, and only if a sum insured has been agreed.

No general rule can be laid down relating to the insurer's liability for damage and other partial loss: liability will depend entirely on the conditions of the individual types of insurance.

#### **Clause 4-2. General financial loss and loss resulting from delay**

This Clause is identical to Cl. 63 of the 1964 Plan.

The question concerning the interest insured will normally be regulated under the individual type of insurance. However, it should also be addressed in the general part of the Plan for pedagogical reasons.

The provision reflects the fact that the marine insurer's liability is normally limited to losses consisting of destruction or reduction in value of the actual interest insured. Consequential losses sustained by the assured as a result of the casualty are not recoverable. However, the Clause merely indicates a general principle, and must in many situations be read in conjunction with the liability rules in the chapters relating to the particular types of insurance.

The exception for "general financial loss" is aimed at any general loss the assured may suffer in his trade as a result of a casualty. The casualty may result in his being forced to reorganise his business or to re-route other ships, whereby his earnings are reduced or his administration and operating expenses are increased. Such losses are not recoverable.

The other main group of non-recoverable losses are losses arising from the delay of the insured ship caused by the casualty. The term "loss of time" is aimed at the assured's operating expenses and his loss of freight. However, the Plan provides a special rule for compensation on a number of points in this respect as well, see Cl. 12-11 and Cl. 12-13 relating to loss of time in connection with the invitation to submit tenders and operating expenses during removal of the ship to a repair yard, Cl. 12-7, Cl. 12-8 and Cl. 12-12 which, in different contexts, take into consideration the loss of time which the assured suffers as a result of the casualty, and the rules relating to the special types of insurance aimed at covering loss of time, in particular Chapter 16.

The terms "loss due to unfavourable trade conditions" and "loss of markets" contemplate the situation where the ship, due to a casualty, will miss the opportunity to benefit from favourable trade conditions and can only be put into service in a lower freight market. Losses of this nature are never recoverable. To avoid any misunderstanding, the limitation of liability is extended to comprise also "similar losses resulting from delays".

#### **Clause 4-3. Costs of providing security, etc.**

This Clause is identical to Cl. 64 of the 1964 Plan.

Under Cl. 5-12, the insurer is not obliged to provide security for claims brought by a third party against the assured, which are covered by the insurance. However, if the assured incurs expenses in order to obtain such security, these must, according to the first sentence, be recoverable as expenses incurred due to the casualty. That the expenses must be “reasonable” implies *inter alia* that the assured cannot claim compensation of the costs incurred by providing security for amounts which clearly and considerably exceed the third party’s claim. Cl. 5-7 allows the assured, under certain conditions, the right to demand payment on account. Thus, before providing security for a third party’s claim, he must submit to the insurer the question of whether the claim should be met by a payment on account. If he has failed to do so, the insurer will not be liable for the costs in connection with the provision of security, *cf. second sentence*.

If it is uncertain whether the insurer is liable for an invoice from the repair yard, the insurer is not obliged to make any payment on account under Clause 5-7. If the shipowner in such situations does not have money to pay the repair invoice, it may have to provide a bank guarantee pending a settlement from the insurer. If the insurer later proves to be liable, the question arises as to whether the insurer must also pay the commission on the bank guarantee. In practice, the provision has been interpreted to mean that it only concerns costs in connection with the provision of security for liability to third parties. However, during the revision of the Plan, there was general agreement that the insurer should have an obligation to cover costs in the above-mentioned situation as well. If the shipowner had raised a loan and paid the repair yard in cash, the insurer would have had to pay the interest on the compensation under the rules set out in the insurance contract. To be consistent, it seems reasonable that in such an event, the insurer must also pay the costs of providing security. However, it is not necessary to amend the provision in order to authorize this solution; it is covered by the wording as it was in the 1964 Plan.

If owner’s repairs are carried out concurrently with casualty repairs, the commission must be apportioned on a proportional basis. If some of the work is paid for in cash, while a bank guarantee is provided for the balance, the cash portion as well as the guarantee must be apportioned according to the proportion of owner’s repairs/deductible to the amount for which the insurer is liable.

#### **Clause 4-4. Costs of litigation**

This Clause is identical to Cl. 65 of the 1964 Plan.

There may be doubt as to who shall bear the litigation costs in the event of a dispute between the assured and the insurer as to whether a case against a third party shall be taken to court. In such situations, several insurers with conflicting interests will normally be interested in the question. Cl. 5-11 is an attempt to resolve the difficulties that may arise in such cases.

## Clause 4–5. Costs in connection with a claim

This Clause was amended in the 2019 Version.

*Sub-clause 1* covers all **costs** incurred after the casualty which are necessary in order to establish whether any **recoverable loss** has occurred and, if so, its extent, or which are necessary in order to secure any recourse against third parties. Thus the insurer shall pay costs in connection with **the necessary factual investigation and damage surveys. The same applies to costs in connection with** the conduct of a vessel's protest and maritime accident inquiry, provided that these measures are attributable to a casualty which resulted, or could have resulted, in recoverable losses. **The provision does not distinguish between costs incurred by the insurer or the assured. The assured's surveyor is, however, covered by sub-clause 2.**

A requirement for cover of costs is that there has been a casualty which may result in a claim under a particular insurance cover. If for example the object insured does not function as intended, the hull insurer will not cover cost of technical investigations if the conclusion is that there is no damage and that the malfunction or errors were caused by some inherent defects, or simply not fit for purpose. The same must apply even if there has been an external event with an increased risk of damage but no damage has occurred. Say that the insured object has been exposed to heavy weather and it is decided to check whether the object has suffered any damage, such investigations must be considered as part of the normal operation of the object and the cost have to be covered by the assured if no damage is found. If technical inspections are carried out on various individual and independent parts of the object, and one or more of these parts are found damaged, the costs should be apportioned as per Cl. 4-6. An external event may constitute a "casualty" where inspection costs might be covered in full even if no damage is found. The typical example is a grounding incident where the insurer will cover a dive survey even if no damage is found.

There might be situations where costs incurred shall be considered as repair costs even if considered in isolation they have the character of determining the extent of damage. That is the situation if in parallel with repairs adjacent areas or connected interdependent parts are dismantled and checked for damages. E.g., if it is likely that there might be consequential damages to the gear following a damage to a propeller blade of a thruster, costs of dismantling the thruster for investigation should be considered as repair costs even if no other damage is found. The same solution applies if the class due to the characteristics of a grounding incident require that the vessel should be docked.

Even if the extent of damage has been ascertained it might be necessary to conduct further technical investigation regarding the cause of damage. If the cause, however, is sufficiently

established to conclude that the loss is recoverable under the insurance, further investigations into the root cause will as a starting point be for owner's account. Such further investigations might be required by third parties or be necessary to upgrade the insured object to avoid this kind of damage in the future. If further investigations into the root cause are necessary for the purpose of recourse against a third party, such costs may still be covered by the insurance as recovery costs.

**This provision will also covers costs of obtaining expert opinions in order to clarify technical or legal questions, for example, an opinion to document the cause of a corrosion damage or expert assistance on a specific legal question. Costs incurred by the assured by engaging legal or technical consultants in a dispute with the insurer will not be covered. However, if the dispute ends up in litigation, the applicable procedural law will regulate recovery of legal costs.**

*Sub-clause 2* covers the assured's surveyor. This provision has according to long-standing and uniform practice been subject to a relatively strict interpretation.

Costs connected with the assured's surveyor/technical consultant are only recoverable if the insurer has been given the opportunity to participate in the survey, and the insurer's liability is normally limited to the costs of one surveyor/technical consultant engaged by or from the shipowner's company. However, in complex or large cases with extensive workload for the assured's surveyor/technical consultant, the costs of more than one surveyor/technical consultant is recoverable. The insurer's liability for costs of the surveyor/technical consultant is furthermore limited to the time the repairs take plus travel and maintenance expenses in connection with travelling to and from the place of repairs. The costs will be covered even if repairs are carried out at the home town of the owners' surveyor/technical consultant, but the costs will of course be limited to the time attending the vessel for repairs. Costs in connection with the settlement of the repair invoice are also recoverable, but planning of repairs before the vessel's arrival and administration costs are not.

As regards other costs, the insurer does not cover internal costs or the costs of hiring someone to draw up the statement of claim or retaining legal or expert assistance to draft the claim submission to the insurer. Internal costs and costs for external assistance that should have been obtained internally should not be recoverable.

Nevertheless, the recovery of costs in connection with the claims settlement is subject to the condition either that it is clear in advance that the claim exceeds the deductible, or at least that there is reasonable doubt whether the claim will exceed the deductible.

**Sub-clause 3 introduces no material changes. In previous versions the basis for cover of costs relating to handling and adjusting the claim was encompassed by the wording “costs of establishing the loss and calculating the compensation”. The provision establishes that the insurance covers costs of handling the claim as well as drawing up the adjustment. The provision does not distinguish between work contracted to a third party or carried out with the claims leader’s internal resources. It might also be that the management and handling of the claim is carried out by the insurer and the adjusting is outsourced to a third party or vice versa.**

In the event of what is known as “aggregate deductibles” the assured will, in addition to the ordinary deductible per loss, bear a risk for a certain period. Under certain such clauses the assured must cover any damage occurring within the stated period of time until the amount of damage exceeds the amount of the aggregate deductible. In that event, until the entire aggregate deductible has been “consumed”, it may be alleged that the casualties occurring are not relevant to the insurance. This is not correct, however: an overview of the casualties occurring is needed in order to know when the aggregate deductible has been exhausted and the insurer’s liability arises. Accordingly, the insurer should cover **costs** in connection with **survey and** claims settlements for such casualties, even if **the insurer**, due to the aggregate deductible, does not incur any liability for the actual loss.

#### **Clause 4–6. Costs in connection with measures relating to several interests**

This Clause is identical to Cl. 67 of the 1964 Plan.

The provision confirms the principle of apportionment when costs are incurred in connection with measures relating to several interests. The principle of pro rata apportionment is of great practical significance for litigation costs and costs in connection with the claims settlement. In a collision case both the hull insurer and the P&I insurer will often be interested on the side of the assured; in that event the litigation costs shall be apportioned taking into account the maximum amounts for which the two insurers may be held liable as a result of the legal proceedings. Likewise, the counterclaims filed by the assured in the proceedings will partly accrue to him and partly to his hull insurer. The costs involved in the pursuit of the counterclaims will then have to be apportioned between them in proportion to their interests in the litigation.

According to practice, the term “several interests” does not comprise the assured’s uninsured interests, for example in the form of under-insurance or deductible. If the assured has such uninsured interests, the insurers will cover the costs in their entirety without making any apportionment. This nevertheless does not apply to costs associated with the pursuit of a counterclaim; the counterclaim shall be apportioned between the assured and the insurer, depending on the proportion of the insured to the uninsured interests, and the costs must then be apportioned in the same proportion.

In practice, exceptions have also been made from the principle that regard shall not be had to uninsured interests if it is a question of large deductibles in the form of layers of insurance held by the assured. Even if the point of departure should be that no apportionment is to be made over such uninsured interests, regardless of how large they are, it must be correct to distribute the costs between the insurer who is liable for the deductible and the other insurers if the deductible is insured.

The rule of apportionment in Cl. 4-6 applies regardless of whether it should prove later that the claim is lower than the deductible. In such cases the assured's claim will not be recoverable as such, but his costs will be recoverable in full, cf. Cl. 12-18, sub-clause 3, which provides that these costs are recoverable without any deductible. However, if it is already clear from the start that the loss or liability is lower than the deductible, the insurer will not be liable for the costs.

Cl. 12-14 contains a special rule relating to the apportionment of accessory costs of repairs.

## Section 2

### Costs of measures to avert or minimise the loss, including salvage awards and general average

#### General

The rules relating to costs of measures to avert or minimise loss, including salvage and general average, establish whether the assured is entitled to recover costs he has incurred by initiating measures to avert or minimise loss. It is a fundamental principle in all non-life insurance that costs incurred in order to avert or limit a casualty are recoverable, provided that the measures causing the costs are deemed to be reasonable and sensible. The certainty of obtaining cover will give the assured an additional motive to initiate measures to avert or minimise loss. Furthermore, general considerations of fairness suggest that the insurer should cover such costs since he is the one who will greatly benefit from such measures being taken.

However, the rules relating to the recovery of costs of measures to avert or minimise loss are far more complicated in marine insurance than in other types of insurance. This is due to the fact that in marine insurance these costs are recoverable on the basis of two different sets of rules. The first set of rules is based on *general average law*, which regulates the relationship between the ship and its owner on the one hand, and the cargo and its owner on the other, where ship and cargo are exposed to a common danger or inconvenience. The costs that are incurred and apportioned over ship, cargo and freight according to the rules of general average are recoverable as costs of measures to avert or minimise loss under the hull insurance, the cargo insurance and the voyage freight insurance, respectively. It is thus first and foremost the underlying general average rules which decide if, and to what extent, the assured

shall recover his costs of measures to avert or minimise loss in such situations. At the same time, the general average rules serve to apportion the relevant costs among the insurers involved.

The general average rules provide a complete regulation of most of the questions that arise in connection with measures to avert or minimise loss for a ship carrying a cargo. They decide both whether the general conditions for carrying out measures to avert or minimise loss are satisfied (whether a sufficient degree of danger exists), and determines what sacrifices and costs are recoverable and how the compensation shall be calculated.

The main source for general average settlements is the York-Antwerp Rules (YAR). The latest rules are from **2016**. In international shipping, it is very rare for alternative settlement rules to be agreed, even though alternative clauses do exist. Market agreements may also have been entered into between several insurers' associations **regulating** an apportionment, cf. e.g., **the SCOPIC Clause incorporated into Lloyd's Open Form**, which is referred to in further detail below under Cl. 4-8 and Cl. 4-12, **where certain measures taken to protect against environmental risks fall into the owners' P&I cover**. To the extent that the insurers have acceded to such agreements, these will obviously take precedence over YAR in the event of a conflict of rules.

The *other* set of rules is the traditional insurance law system, which is *inter alia* reflected in the relevant Nordic Insurance Contracts Acts. The insurer shall cover the costs incurred by the assured in connection with extraordinary and reasonable measures to avert or minimise loss for the insurer. Normally it will be a question of measures taken to cover one interest insured. This is why the term costs of *particular* measures to avert or minimise loss is used here. However, it is conceivable that measures are taken aimed at saving several interests insured without the general average rules becoming applicable. It is therefore also necessary in connection with the costs of particular measures to avert or minimise loss to have rules that apportion the costs among several insurers involved.

The two sets of rules stipulate somewhat different requirements as to what constitutes a relevant measure, and each uses a different basis for calculating recoverable costs. The rules relating to general average costs and the rules relating to the particular costs may, on certain points, result in different solutions for actual situations that are fairly similar. This has been resolved by, on the other hand, giving the general average rules a certain extended application when a measure is only aimed at salvaging the ship. On the other hand, a situation which is in principle regulated under general average law, *viz.* damage to the ship as a result of a general average act has been moved over to be covered by the ordinary damage rules, provided that these rules afford better cover for the assured than the general average rules.

The new Plan retains the solutions from the 1964 Plan, based on the traditional system in marine insurance. However, the heading has been changed so that it is clearly evident that the section in

reality also comprises salvage awards, even though this is only reflected indirectly in the individual provisions. The sequence and content of the provisions have furthermore been adjusted in order to achieve a certain simplification. In an introductory provision, Cl. 4-7, the general criteria for covering loss arising from measures to avert or minimise loss are established. The scope of the insurer's liability for general average contributions etc. appears from Cl. 4-8 to 4-11, while the scope of liability for costs of particular measures to avert or minimise loss is placed in a new provision, Cl. 4-12, at the end of the Section.

#### **Clause 4-7. Compensation of the costs of measures to avert or minimise loss**

The provision states the general criteria for compensation of costs of measures to avert or minimise loss, including salvage awards and general average. The first part of the provision corresponds largely to Cl. 68 of the 1964 Plan as regards the criteria for the costs being recoverable. The decisive criterion is that a “casualty threatens to occur or has occurred”. This is a fundamental condition for compensation of costs of particular measures to avert or minimise loss. Under the rules of general average, this condition corresponds to the “common safety” principle, which states that if the interests involved are exposed to a common risk during the voyage, the costs in connection with averting that risk shall be apportioned among those interests in proportion to the value each of them represents. An example of a common peril is where the ship takes a heavy list and threatens to go down. Relevant costs may, for example, be a salvage award paid to a salvor or compensation to a cargo owner who suffers a loss because his cargo is jettisoned in order to right the ship.

However, under the rules of general average, extraordinary costs incurred in a port of refuge for the common benefit of the interests involved with a view to continuing the voyage will also be covered (“the common benefit” principle). The interests are not exposed to any common peril but, under the rules of general average, the costs incurred, e.g. costs of discharging, handling, storing and reloading of cargo while the ship is being repaired, are nevertheless apportioned. This compensation is not covered by the wording in Cl. 4-7, and the provision is therefore not quite accurate in relation to the general average regulation. It is, however, expedient to confirm in Cl. 4-7 the fundamental requirement that a casualty must have occurred or threaten to occur. Furthermore, through the provision in Cl. 4-8, it emerges with sufficient clarity that if common benefit costs constitute part of the general average contribution, they shall be covered by the insurance.

The last part of the provision corresponds to the wording of Cl. 68 of the 1964 Plan, but is somewhat simplified in accordance with the corresponding wording in the Norwegian Insurance Contracts Act, Section 6-4.

A main problem in applying the rules relating to costs of measures to avert or minimise loss is distinguishing between the measures which are in the nature of measures to avert or minimise a loss

for which the insurer is liable, and the measures which the assured must take for his own account as part of the general obligation to safeguard and preserve the object insured. In general average law, the solution is based partly on detailed provisions, partly on established average-adjuster usage. These solutions may often provide a basis for analogous conclusions in relation to the particular measures to avert or minimise loss. The following presentation does not aim to be exhaustive, but merely highlights a number of relevant elements. The presentation is based on the rules relating to particular measures to avert or minimise loss. As regards general average, some of the principles must be adjusted slightly in accordance with the general average rules. Some of these adjustments are referred to in the presentation:

(1) As mentioned, particular measures to avert or minimise a loss are subject to the fundamental condition that a casualty has either occurred or there is imminent danger that a casualty will occur. The first alternative does not give rise to any difficulties. It is very difficult, however, to indicate the degree of danger required in order to entitle the assured to counter the danger at the insurer's expense. As a rule, an increase in the general maritime risk will not give the assured such a right, unless something else has occurred at the same time which can only be averted through extraordinary measures, cf. under (2) below. In general average law, this principle is reflected in the "common safety" standard, which will, for example, entail that the insurer is not liable for additional consumption of bunkers or other costs incurred by heaving to or putting into a port of refuge during a heavy storm, unless an accident or the like has occurred which may entail a risk of breaching technical or operational safety rules during the further voyage.

(2) In addition to the imminent danger mentioned above under (1), a further requirement is that the assured or a third party has initiated measures of an extraordinary nature. Whether the measures are of such a nature must be decided on a case-to-case basis. On this point, Cl. 68 of the 1964 Plan contained an explicit enumeration of a number of elements, in relation to which the question of the extraordinary nature or foreseeability of the measure was to be evaluated, viz. "the ship's voyage, the nature of the cargo and the circumstances prevailing when the voyage was commenced". These elements were included primarily with a view to P&I insurance. Given the fact that the Plan no longer applies to P&I, there is less need for such an enumeration. This part of the provision has therefore been deleted, but the elements may, of course, still carry weight in the case-by-case evaluation of the type of measures that are deemed to be extraordinary. Losses arising through an ordinary and foreseeable use of the ship and its equipment do not entail entitlement to compensation under the rules relating to measures to avert or minimise loss, and the same applies to costs the assured had to expect might arise in the course of the voyage. It is hardly possible to give any further guidance; the decision must be made on a case-to-case basis.

In practice, the distinction between ordinary and extraordinary measures has particularly caused problems in connection with what has traditionally been described as "increased ordinary voyage

expenses”, cf. the exception for operating expenses referred to in the Commentary on Cl. 4-2, and under item 10 below. These are expenses that must be anticipated from time to time during the voyages of a ship, e.g. due to problems relating to weather and currents, or minor technical problems regarding the ship. One example is where the ship’s stern tube is damaged with the result that oil is leaking out. The voyage may nevertheless be continued by refilling new oil as and when necessary, but the question is whether the expenses of extra oil shall be regarded as “extraordinary”. Practice has been fairly restrictive as regards the compensation of this type of expenses. It has been alleged that practice is too strict, but during the Plan revision it was decided that the best course was still to leave the distinction between ordinary and extraordinary measures to be settled by existing practice.

(3) Only losses which the assured has suffered as a result of an intentional act by the assured or others will be recoverable as costs of measures to avert or minimise loss. For further details, see below under (5). Damage caused by forces of nature or injurious acts by outside third parties without any intentions to avert or minimise loss is only compensated under the general indemnity rules in the insurance conditions. However, at any rate for particular measures to avert or minimise loss, it must be sufficient that the intent comprises the actual action that caused the damage. It is thus not necessary that the person in question realized that the act entailed a risk of damage, nor that the intent comprised all or parts of the loss that occurred, cf. ND 1978.139 NV STOLT CONDOR and ND 1981.329 NV LINTIND.

(4) In order for a loss to be covered by the rules relating to measures to avert or minimise loss, it must have been sustained for the purpose of averting or reducing a loss covered by the insurance. This was earlier expressed by the wording that the measures had to be implemented “in order to avert or minimise losses covered by the insurance”. This wording has been superseded by the words “on account of a peril insured against”, which have been taken from Cl. 70 of the 1964 Plan. It is not necessary that the person causing the loss realizes that he is safeguarding the insurer’s interests. It is sufficient that he acts with the intention of averting the actual loss. The insurer will therefore be liable under the rules relating to measures to avert or minimise loss, even if the loss is caused by a third party who did not know that an insurance had been effected in respect of the object he was attempting to save, or by the assured himself in cases where he did not realize that he was covered against the loss he was attempting to avert. The deciding factor is whether, under the insurance conditions, the insurer would have had to compensate the loss which an attempt was made to avert, and not whatever the assured or any third parties may have imagined in this connection. However, their subjective conceptions may become significant in another way, cf. below under (6).

(5) It is furthermore irrelevant whether it is the assured himself, his own people or an outside third party who have implemented the measures to avert or minimise the loss.

(6) A further requirement is that the measures “must be regarded as reasonable”. The text has been somewhat simplified on this point as well. In the 1964 Plan, the requirement of reasonableness was

linked to "the prevailing circumstances at the time they were implemented". This simplification is not intended to change any points of substance either. The requirement must be regarded as a sort of safety valve for the insurer and plays a very minor role in practice. It is obvious that the assured must have a wide margin for misjudgements once the casualty is a fact or the risk of a casualty is imminent. In this connection reference is made to Cl. 3-31, where gross negligence on the part of the assured is required in order for the insurer to be entitled to plead that the insured has neglected his duty to avert and minimise the loss.

Whether or not the measures taken were justifiable must be judged in the light of the situation as it appeared to the assured when the peril struck. That the subsequent course of events showed that he was mistaken is therefore in principle irrelevant. It is thus not necessary that there was a *de facto* situation that warranted the implementation of measures to avert or minimise the loss; the deciding factor is that the assured *believed* that the situation was that serious. However, it is a prerequisite that the assured has shown due diligence. If he was wrong, his conduct must be judged under the rules in Chapter 3, Section 5, of the Plan relating to casualties caused intentionally or negligently by the assured. If he has, through gross negligence, misjudged the situation, the compensation may be reduced or be forfeited altogether under Cl. 3-33.

Measures to avert or minimise loss will often be implemented by others acting on behalf of the assured, in particular the master and other members of the crew. If they implement measures that must be described as unjustifiable in the situation in question, this will normally constitute faults or negligence committed in connection with their service as seamen, against which the assured is covered under Cl. 3-36. The insurer must normally also accept liability if the misjudgement is attributable to an outsider who intervenes on his own initiative in order to safeguard the assured's interests.

(7) It is irrelevant that the measures prove to be in vain. In principle, the insurer compensates both the costs of the measures to avert or minimise the loss and the loss which a vain attempt was made at averting. The only limitation is implicit in the requirement that the costs must be reasonable.

(8) The principle that the insurer shall cover both the damage and the costs of measures to avert or minimise loss is, however, subject to certain limitations in terms of amount, cf. Cl. 4-18. In such cases, the insurer's liability is limited to twice the sum insured apportioned among damage and costs according to the rules in Cl. 4-18. On this point, the Plan differs somewhat from relevant Nordic Insurance Contracts Acts, which contains the principle that the costs of measures to avert or minimise loss shall be recoverable in full, in addition to the whole sum insured for damage sustained. A similar rule applied under Cl. 80 of the 1964 Plan. However, this rule was amended in the Special Conditions, and this solution has been maintained in a somewhat modified form in the new Plan, cf. Cl. 4-18 below for further details.

(9) In earlier case law, a limitation was established to the effect that the loss was not recoverable unless “a real sacrifice” has been made, cf. ND 1918.513 NV VEGA and ND 1947.122 Bergen JUSTI. In the Commentary on the 1964 Plan, this limitation was specified: “the assured cannot claim compensation under the special rules relating to measures to avert or minimise the loss of an object which, at the time it was sacrificed, was exposed to a special peril which would have resulted in its loss regardless of what happened to the ship”. The Plan maintains this solution.

(10) Under the cover of costs of measures to avert or minimise loss, the insurer is liable for all types of loss and not just those for which he would have been liable under the general primary cover rules of the relevant insurance. The idea is that the assured shall be indemnified for any loss that he suffers due to the said measures. The insurer is therefore liable for damage to or loss of the object insured, or other objects belonging to the assured, for costs incurred and for liability incurred vis-à-vis a third party. However, a limitation follows from Cl. 4-12, cf. Cl. 4-2: the insurer is not liable for a general financial loss nor for loss of time, loss due to unfavourable trade conditions, loss of markets and similar losses resulting from a delay.

It follows from the principle that the insurer covers all losses in connection with measures to avert or minimise loss that the loss is also covered without deductible, cf. Cl. 12-18, sub-clause 3. This also applies to the cover of general average contributions. The general average rules contain special rules, however, relating to new for old deductions, which indirectly involve a certain limitation of the cover of costs of measures to avert or minimise loss.

#### **Clause 4–8. General average**

The second sentence of sub-clause 1 was editorially amended in the 2013 Plan to avoid any possible misunderstandings. **The Commentary was further amended in the 2019 Version.**

As mentioned in the introduction to this Section, the insurer will very often be liable for losses incurred in connection with measures to avert or minimise loss in the sense that he covers the general average contribution imposed on the assured, cf. *sub-clause 1, first sentence*. As with the particular measures to avert or minimise loss, it is a condition that the general average act is carried out with respect to a peril which is covered by the insurance. If the measure is taken in order to avert war perils, the war-risk insurer will thus be liable for the contribution. However, it is not necessary to verify whether the insurer would have been liable for each and every loss that the (preventive) measures were meant to avert and which are recoverable in general average. Thus, the hull insurer is also liable for the contribution the assured is called on to pay to cover the “common benefit” expenses, despite the fact that they are not aimed at averting any loss which is covered by the hull insurance. Thus, once a general average adjustment has been made, it is regarded as an entity in relation to the insurer. In the event of a pure T.L.O. insurance under Cl. 10-5, however, a verification must be made as to whether

there was any risk of a total loss when the general average act was carried out, and the contribution shall only be recoverable in so far as it covers losses in connection with measures to avert a total loss.

The first sentence makes the insurer liable for general average contributions which are apportioned on the insured interest, which is normally the insured ship. If so, it is the hull insurer which is liable for the general average contributions apportioned on the insured ship. The hull insurer will under the second sentence also be liable for general average contributions which are apportioned on an otherwise uninsured interest – freight or charterparty hire - provided that the assured is the owner of the said interest. The extension will in practice hardly be of any great economic importance. Normally, the freight will be for the cargo owner's risk and thereby be included in the value of the cargo due to the fact that through clauses such as "freight non-returnable, ship and/or cargo lost or not lost" it has been prepaid with final effect.

The contribution is recoverable on the basis of a lawful average adjustment, cf. sub-clause 1, *third sentence*. In the event of minor casualties the insurer will often agree to an informal general average adjustment, which is not drawn up by an average adjuster. The general average adjustment must be drawn up in accordance with current rules of law, or conditions considered customary in the trade concerned. Normal procedure would be for the general average adjustment to be drawn up on the basis of the York-Antwerp Rules, but in principle there is nothing to prevent the application of other conditions which are considered customary in the trade in question.

The contribution is recoverable regardless of what items of loss are included in the general average adjustment, as long as the adjustment as such is correct. The Plan does not make exceptions for compensation of general average expenses. However, a more detailed regulation of the insurer's liability may follow from market agreements, if the Nordic market has explicitly supported these, cf. e.g. **the SCOPIC Clause** linked to Lloyds Open Form which is mentioned above in the introduction to this Section. **The SCOPIC Clause will regulate the apportionment of the salvage remuneration** in connection with an environmental salvage operation according to Articles 13 and 14 of the Salvage Convention of 1989, **with the SCOPIC tariff remuneration replacing the method of assessing Special Compensation under Convention Article 14(1) to 14(4) inclusive. The SCOPIC Clause provides that SCOPIC remuneration shall not be a general average expense to the extent that it exceeds the Article 13 Award; any liability to pay such SCOPIC remuneration shall be that of the shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration in excess of the Article 13 Award shall be made in general average or under the vessel's hull and machinery policy by the owners of the vessel.**

The contribution is recoverable according to the general average adjustment, even if the contributory value exceeds the insurable value of the interest, cf. sub-clause 1, *fourth sentence*.

The first sub-clause, *fifth sentence*, was added in 2010 as a result of amendments **introduced in YAR 2004**, rule VI, to the effect that salvage awards (including interest and costs of legal assistance in that connection) hereafter will not be recoverable in general average. These costs were previously recoverable in general average. **The same rule is also found in YAR 2016**. The salvage award was thus “re-distributed” on the basis of the contribution values determined under YAR, which could differ from the salvaged values that were determined when fixing the salvage award. If YAR 2004 **or 2016** is to serve as the basis for the general average adjustment, however, it is natural that the insurer is also liable for the salvage award apportioned on the insured interest and any salvage award apportioned on freight or charterparty hire for which the assured bears the risk, in the same way as for cover of general average contributions.

In practice, the question concerning the assured’s interest claim in connection with general average adjustments has caused problems. Under YAR 1994 and **subsequent versions**, rule XXI, interest on disbursements, etc. is now recoverable up to three months after the date of the average adjustment. If the due date for the claim under the insurance, cf. Cl. 5-6, is fixed after that point in time, the assured must be entitled to interest under the general rules of the Plan, cf. Cl. 5-4. If, on the other hand, the due date for the claim under the insurance is set at a date prior to three months after the date of the average adjustment, the situation is different. In that case it is natural that the insurer does not have to pay interest recovered in general average after the due date prescribed in accordance with Cl. 5-6. This is now provided in the first sub-clause, sixth sentence.

Under *sub-clause 2*, the insurer is liable for the contributions which according to the rules of general average fall on the interest insured, even if the assured is precluded from claiming contributions from the other participants in the general average adjustment. The rule is concordant with the solution in the 1964 Plan, and is relevant if the assured (normally the shipowner) is liable to the other interested parties for the event that has made the general average act necessary, cf. in this respect ND 1993.162 NH FASTE JARL. In that event, the assured cannot claim contributions from those parties. This applies e.g. if the ship must be considered unseaworthy in relation to the cargo, or if the ship has deviated from the route it was bound to follow according to the contract of affreightment. However, the gravity of the assured’s conduct will rarely be such as to result in his forfeiting his right to compensation from the insurer under the insurance conditions as well. This will only be the case if the unseaworthiness was of such a nature as to also constitute a breach of safety regulations in relation to Cl. 3-22, or the deviation has taken the ship outside the trading areas, cf. Cl. 3-15, sub-clause 3. Where the assured has maintained his rights vis-à-vis the insurer, the traditional solution is to impose on the insurer liability for the losses that must be deemed to have been incurred in order to save the interest insured. The loss suffered by the assured due to the fact that his right to claim general average contribution from the cargo is forfeited will be covered by the P&I insurer.

An outcome such as this is less logical, however, if measures to avert or minimise loss have resulted in damage to or loss of the actual object insured. The consequence would then be that the assured would only obtain partial compensation under the hull insurance for damage incurred through measures to avert or minimise loss because he had breached a contract of affreightment. Liability for the excess loss would then have to be transferred to the P&I insurance. As long as the assured has not disregarded the insurance contract in such a manner that his cover is reduced or forfeited, the hull insurer should provide full cover for the damage which the ship sustains, regardless of whether the damage is due to measures to avert or minimise loss or has arisen by way of an accident. Cl. 4-10 of the Plan, which gives the insured an unconditional right to claim compensation for damage to or loss of the object insured under the rules relating to particular loss will therefore prevail over Cl. 4-8 and entitle the assured to full compensation. The limitation rule in sub-clause 2 will first and foremost be of significance for salvage, port of refuge expenses and “common benefit” costs.

When a salvage award has been incurred for a ship carrying a cargo, this amount will sometimes be apportioned twice, first during the salvage award case and subsequently in connection with the general average adjustment. These apportionments may differ from each other because the contribution value may differ from the value of ship and cargo on which the salvage-award case was based. The same applies if one or more of the interested parties have negotiated separately with the salvors, and thereby achieved a better apportionment under the salvage award settlement than under the average adjustment. In the final settlement between ship and cargo, the subsequent general average apportionment will normally be decisive, and it is also that apportionment which shall form the basis of the hull settlement. Nor has any rule been issued stipulating a duty for the insurer to pay the proportion of the salvage award that the shipowner may be ordered to pay in the salvage award case. **Still the assured's general right to demand a payment on account pursuant to Cl. 5-7 will apply.**

Where the insurer is liable to the assured for a loss that is also covered by the contribution from the other interested parties, he will be subrogated to the contribution claim to a corresponding extent, cf. Cl. 5-13. Whether or not any contribution claim exists will often depend on whether the owner of the cargo has accepted personal liability when the goods were delivered to him (signed an average bond). If the assured has not obtained an average bond and can be blamed for this, the insurer may invoke Cl. 5-16 concerning the assured's duty to maintain and safeguard the claim.

In a number of situations it is obvious that carrying out a general average adjustment would be uneconomical. If the assured has in that event failed to claim contributions from the other interested parties, the hull insurer has in practice compensated the losses that would have been recoverable in the general average adjustment. This practice will be carried on; it is to the advantage of the assured as well the insurer.

However, the insurance contract has often been taken one step further and what is known as a “**general average** absorption clause” has been included in the contract. This entails that the hull insurer is liable for losses which would have been recoverable in general average up to an agreed maximum amount in all cases where the assured chooses not to claim contributions from the other interested parties. This is a clear simplification seen from the assured’s point of view, and an explicit clause to that effect has now been included in *sub-clause 3*, see sub-clause (a). This means that the principle will apply regardless of whether an individual agreement has been entered into concerning this question. However, the application of the rule is subject to the condition that the insurance contract contains a maximum amount for such settlement.

Normally the losses which the insurer shall cover under sub-clause 3 (a) will have been incurred by the assured himself as sacrifices or expenses resulting from the general average act. If, in exceptional cases, the cargo owner has incurred a loss for which he may claim compensation in general average, e.g. where cargo has been sacrificed in order to salvage a grounded ship, the insurer will, however, in principle also be liable for such a loss. The point is that another solution would involve a risk that the cargo owner might demand an ordinary general average adjustment in order to recover parts of his loss. The condition for the insurer being liable for the cargo owner’s loss is nevertheless that the assured is able to prove that he has in actual fact had to cover it, e.g. as a result of a clause in the contract of affreightment, in other words that it arises as a liability for the assured.

As an alternative to cover under the “**general average** absorption” clause in sub-clause (a), sub-clause (b) instead entitles the assured to claim compensation for the ship’s general average contribution, as this appears in a simplified general average adjustment. In that event, the assured will recover the general average contribution that would have been apportioned on the ship, but without any contribution being claimed by the cargo owner. However, the assured must choose between a settlement based on the rules in sub-clause (a) or in sub-clause (b). He cannot combine the solutions, e.g. by first claiming compensation within the agreed sum under sub-clause (a) for losses incurred, and subsequently the ship’s general average contribution under sub-clause (b). However, he will always be entitled to claim compensation for damage to or loss of the object insured under the rules in Cl. 4-10 if he finds that this gives him more favourable cover.

When deciding whether and to what extent loss, expenses etc. are recoverable under sub-clause 3, it follows from sub-clause 3, *second sentence*, that the provisions in the York-Antwerp Rules **2016** shall be used as a basis, regardless of what rules the contract of affreightment might contain relating to general average. Cover under YAR does not, however, apply to interest and commission, the costs of which will have to be recovered under Cl. 4-3 and Cl. 5-4 of the Plan, cf. the reference to Cl. 4-11, sub-clause 2, second sentence. This must otherwise mean that interest and commission, which in such case are to be apportioned under the rules of the Plan and not YAR, are recoverable in addition to the maximum amount stipulated in the insurance contract for sub-clause 3 (a). It is also considered to be

most natural that fees for issuing the claim adjustment and the insurer's handling of the matter are recoverable in addition to this maximum amount.

#### **Clause 4–9. General average apportionment where the interests belong to the same person**

This Clause is identical to Cl. 71 of the 1964 Plan.

The provision is necessary in order to implement the apportionment among the insurers with whom the assured has taken out his insurances. For the uninsured interests, the assured must bear his own proportionate share.

#### **Clause 4–10. Damage to and loss of the object insured**

This Clause was amended in the 2019 Version.

The provision **gives the assured a right to claim** compensation for general average damage to the ship under the rules relating to particular average. **The rationale is that the assured shall always have the right to claim under the insurance contract in respect of any physical damage to the vessel, including sacrificial damage, and settle this concurrently with the particular average damage, thus not having to wait for a general average adjustment which often may take a long time to finalize.**

Where the insurer indemnifies hull damage according to the rules relating to particular average, he is subrogated to the assured's claim against the other participants in the general average. **Therefore, even if sacrificial damage has been claimed under the rules relating to particular average pursuant to this Clause, there is still a duty to secure the claim against the other parties to the general average, ref. Chapter 5, Section 3, and particularly Cl. 5-16. In other words, the assured should consider to declare general average in order to recover other parties' contribution of sacrificial damage, otherwise he may become liable for the loss to the insurer if he fails to declare general average, see particularly the duty of the assured to maintain and safeguard a claim against third parties as per Cl. 5-16. The insurer will not, however, be subrogated to the assured's claim against the P&I insurer for the hull damage if the contributions are irrecoverable, irrespective of whether the loss of or damage to the object insured is recoverable under the rules relating to general average or under the rules relating to particular damage. Finally, it should be noted that even if sacrificial damage is claimed pursuant to the rules relating to particular average, any deductible agreed under Cl. 12-18 is not applicable to such damage, cf. Cl. 12-18, sub-clause 3. However, any other deduction agreed in the policy will be applicable in the ordinary manner.**

## Clause 4-11. Assumed general average

This Clause corresponds to Cl. 73 of the 1964 Plan.

As mentioned in the introduction to this Section, the general average rules shall also apply when measures have been taken to save a ship in ballast (“assumed general average”), cf. *sub-clause 1*. The rules also apply to losses incurred in order to complete the ballast voyage even though the costs were not incurred to save the ship, e.g. expenses accruing during the ballast voyage where the ship has to put into port for the purpose of carrying out repairs necessary for the safe completion of the voyage. The general average rules become decisive both for the question whether the degree of the peril was sufficient for the assured’s sacrifices to be recoverable, and for the question as to what sacrifices are recoverable.

The same rules shall be applied for the purposes of calculation of the compensation as if the ship had carried a cargo. Thus, with respect to hull damage, the assured shall receive settlement in accordance with the rules that altogether give the most favourable result for him, whereas the settlement in respect of other losses shall be in accordance with the general average rules.

By applying the general average rules to measures to avert or minimise loss for ships in ballast, the cover will be the same regardless of whether the ship is carrying a small cargo or is completely empty. In practice, however, this principle is not carried into full effect. Under sub-clause 2, there are certain limitations to the assured’s right to claim wages and maintenance for ships in ballast under the general average rules. Under the general average rules, the shipowner shall receive compensation for part of the loss of time during the final repairs of the damage, cf. YAR **2016** Rule XI. The shipowner is not entitled to this advantage when permanent repairs of damage the ship has sustained while in ballast are carried out, cf. *sub-clause 2, first sentence*. On this point the 1964 Plan contained an addition to the effect that the limitation also applied to “expenses in substitution of such outlays”. This part of the provision had been incorporated in order to eliminate an earlier unfortunate practice that has now ceased, and it has therefore been deleted. According to established practice, the limitation does not comprise any waiting time before repairs are commenced, but does include waiting time that arises during the repairs because necessary parts are missing. The special rules relating to commission and interest applicable in general average have been set aside as well, cf. *sub-clause 2, second sentence*, of this Clause.

## Clause 4-12. Costs of particular measures taken to avert or minimise loss

This sub-clause corresponds to Cl. 68 and Cl. 69 of the 1964 Plan and relevant Nordic Insurance Contracts Acts (Nordic ICAs). **The Commentary was amended in the 2019 Version.**

As mentioned in the Commentary on Cl. 4-7, during the Plan revision, the view was that it was expedient to state the criteria for the insurer's liability for costs of particular measures to avert or minimise loss in a separate provision. The provision in Cl. 4-12, sub-clause 1, corresponds to those parts of Cl. 68 of the 1964 Plan which deal with the scope of the insurer's liability, but the wording in the Plan has been partly replaced by the corresponding wording in the Norwegian ICA Section 6-4. Reference is otherwise made to the Commentary on Cl. 4-7 as regards the principles for compensation of costs of particular measures taken to avert or minimise loss.

A question that arises in the relationship between Cl. 4-12 concerning particular measures to avert or minimise loss and Cl. 4-8 concerning general average is whether the entire settlement is to be effected in accordance with the general average rules in the event of a general average, or whether there is room for elements being settled under Cl. 4-12. In ND 1979.139 NV STOLT CONDOR the arbitration tribunal reached the conclusion that the same measure could be regarded both as a general average measure and a measure with a view to saving other considerable interests insured. However, the solution does not appear to have been followed up by the industry. The main rule should be that once there is a general average situation, the entire settlement shall be effected according to the general average rules. Exceptions should only be made where there is either an explicit different regulation in the separate insurance conditions, e.g. based on a market agreement among the relevant insurers, or where the other interests insured have the predominant interest in the relevant measure taken to avert or minimise loss. An example of a relevant market agreement is the “**SCOPIC Clause**” linked to Lloyds' Open Form, which **regulates** the apportionment of the remuneration in connection with an environmental salvage operation according to Articles 13 and 14 of the Salvage Convention of 1989. If measures to avert or minimise loss that would have been covered by another insurer have struck interests that are covered under the insurance, the insurer will be subrogated to the assured's claim against the other insurer. In that event, Cl. 5-13 of the Plan will become similarly applicable. In other words, the loss shall end up with the insurer who is liable for the costs to avert or minimise loss. This solution was earlier established in the Special Conditions, cf. Cefor I.4, and PIC Cl. 5.10, and is now explicitly stated in Cl. 2-7, sub-clause 3.

*Sub-clause 2* regulates the situation where a measure to avert or minimise loss is aimed at saving several interests without the general average rules becoming applicable. In that event, there shall be a proportional apportionment of the loss among all of those who have benefited from the measures in accordance with the principle on which the general average is based. The provision corresponds to Cl. 69 of the 1964 Plan, but has been moved, cf. the Commentary on Cl. 4-7. The relevant Nordic Insurance Contracts Acts contain no corresponding rule, but the principle of apportionment is regarded as a general principle in insurance law.

However, the apportionment of the loss under this sub-clause is not entirely consistent. In the first place, it is established practice that the separate insurances against total loss (hull and freight interests)

are not brought into such an apportionment settlement, cf. the Commentary on Cl. 5-13. Secondly, the principle is subject to certain limitations if a measure is aimed at saving the ship, and if the assured in the event of a loss of the ship would also have suffered a loss that was not covered under any insurance. In that case, the insurer will in principle be liable for the entire loss resulting from the measure. Thus, the fact that the ship is valued at a lower amount than the market value (cf. above under Cl. 4-8) is not taken into account, nor will the assured have to bear the portion of the loss which in an apportionment would have fallen on his uninsured income interest. If a liability covered by the insurance has been averted, the fact that a deductible has been agreed which would have resulted in the assured having had to cover part of the liability himself shall not be taken into account, either. However, on one point an exception has been made in practice and the rule of apportionment applied, viz. where the ship's accessories are lost and later saved. The Plan does not aim at making any change to the principles on which this practice is based.

In loss-of-hire insurance, however, the principle of apportionment shall be applied in full, in relation to uninsured interests as well, cf. Cl. 16-11.

Special problems arise in connection with measures to avert or minimise loss which aim at averting partly liability which the P&I insurer would have had to cover, and partly liability or damage which the hull insurer or another insurer would have had to cover. The most common example in practice is the aversion of collision liability. Such liability will, according to the rules in Chapter 13 of the Plan, be covered by the hull insurer to the extent that it falls within the sum insured, and does not concern personal injury, loss of life or other types of loss which are specifically excluded in Cl. 13-1. Liability which the hull insurer (or the hull-interest insurer, cf. 14-1) does not cover, will be covered by the P&I insurer. Liability for injuries/loss of life is the most important. When measures are taken to avert a collision, it will often be possible to establish with a high degree of certainty that liability has been averted for the hull insurer as well as for the P&I insurer, but it will normally be very difficult to establish how large a proportion of the liability each of the insurers would have had to cover. It is not possible to give any simple guidelines for this apportionment; it must be resolved on the basis of the estimated extent of "the interests threatened".

## Section 3

### Liability of the assured to third parties

#### **Clause 4-13. Main rule**

This Clause is identical to Cl. 74 of the 1964 Plan.

#### **Clause 4-14. Cross liabilities**

This Clause is identical to Cl. 75 of the 1964 Plan.

Under Cl. 4-14, *first sentence*, the Plan maintains the principle of cross-liabilities in connection with liability of the assured to third parties. The principle is in accordance with established customary Norwegian marine insurance law, cf. *Brækhus* in AfS 4.468-69 with references, and is of the greatest practical importance in connection with collision settlements. This is best illustrated by a somewhat stylised example:

The insured ship A has collided with ship B. The blame fraction is one half. A's hull damage is 300, the time loss 120, a total of 420. B's loss totals 350. The settlement between the ships under Section 161, second sub-clause, of the Norwegian Maritime Code can be drawn up in two ways. One could either say that the total loss is 770, that each of the parties shall bear one half, i.e. 385, and that this is achieved by the ship having sustained the smallest loss, B, paying 35 to A. Such a single-liability settlement results in a single claim. Or A could also be held liable to pay half of B's loss, i.e. 175, and B to pay half of A's loss, i.e. 210. These two claims are set off against each other, with the result that B must pay the balance of 35 to A. This is the cross-liability settlement.

In the relationship between the parties, the result will be the same regardless of which principle is adhered to. In the ensuing settlement between the individual shipowner and his insurers, the choice between the two methods of settlement will, however, be of great importance. The reason for this is that the compensation obtained from the other ship will often, to a greater or lesser extent, be credited to other persons than those who shall bear the liability of the oncoming ship. The compensation from the oncoming ship shall, as regards the loss of time, fall to the shipowner (if appropriate, the loss-of-hire insurer, cf. Chapter 16), whereas the compensation for hull damage shall normally be divided proportionately between the hull insurer and the owner, cf. Cl. 5-13, sub-clause 2. Liability towards the oncoming ship, however, shall as a rule be covered in its entirety by the hull insurer, cf. Chapter 13 (sometimes the P&I insurer will also come into the picture, see below). If the settlement between the shipowner and the insurer is based on the cross-liability principle, it is the gross liability amounts before the set-off that shall be debited and credited respectively under these rules. If, however, the single-liability principle is adopted, there will be only one amount, the liability balance, to be apportioned. If the balance is in the oncoming ship's favour, it shall be debited to the hull insurer as liability insurer. If it is in the insured ship's favour, it shall be divided proportionately between the owner and the hull insurer. In the light of the cross-liability settlement, the single-liability settlement may lead to the result that a claim from the oncoming ship, which shall accrue to a person, e.g., compensation for loss of time payable to the owner, is used as a set-off to cover the liability of the oncoming ship which, under the insurance conditions, should be covered in full by the hull insurer.

If we assume in the numerical example above that A's hull insurer indemnifies A's hull damage with 240, and that A has to pay the outstanding 60 himself, plus the loss of time of 120, a cross-liability settlement of the collision liability between A and his hull insurer will be as follows:

	<i>A's hull insurer</i>	<i>A</i>	<i>B and/or B's insurers</i>
Hull damage	240	60	
- 1/2 refund from B	- 120	- 30	
	= 120	= 30	150
Loss of time		120	
- 1/2 refund from B		- 60	
		= 60	60
Liability for 1/2 of B's loss	175		- 175
Final total charge	295	90	35

In the event of a single-liability settlement, there will only be one amount, *viz.* the balance of 35 in A's favour, which shall be divided proportionately between A and his hull insurer. As A's total loss was 420, this means that the compensation from B gives a refund of  $35/420 = 1/12$ , and we get the following settlement:

	<i>A's hull insurer</i>	<i>A</i>	<i>B and/or B's insurers</i>
Hull damage	240	60	
- 1/2 refund from B	- 20	- 5	
	= 220	= 55	25
Loss of time		120	
- 1/2 refund from B		- 10	
		= 110	10
Liability to B			0
Final total charge	220	165	35

There can be no doubt that the cross-liability settlement is preferable; it gives the shipowner exactly the refund from the other ship warranted by the portion of blame. In the case of a single-liability settlement, the refund is reduced, in our example from 1/2 to 1/12, despite the fact that the oncoming ship has been held liable for one half of the loss.

The collision settlement will sometimes also affect the P&I insurer: firstly where the liability of the oncoming ship exceeds the limit of the hull insurer's liability, cf. Cl. 13-3 and, secondly, in the event of what is termed indirect personal-injury and cargo liability. For personal injury caused by a collision,

both ships are jointly and severally liable, cf. Section 161, third sub-clause, of the Norwegian Maritime Code; under US law the same also applies to liability for cargo damage. It is therefore conceivable that the oncoming ship B must pay compensation for personal injury, or for damage to the cargo on board the cargo-carrying ship A and that, in the settlement with A, B attributes half of the compensations paid to A. A for its part may have suffered far more extensive damage from the collision than B, which would mean that a settlement of the hull damage alone would give a substantial profit in A's favour. However, this is wholly or partly set off by B's refund claim in connection with the personal injury and cargo damage compensations. In this case as well, the final balance that emerges from the external settlement must be divided into claims and counterclaims according to the cross-liability principle, given that the indirect liability for personal injury and damage to the insured ship's own cargo shall be attributed to the P&I insurer, cf. Clause 13-1, sub-clause 2 (b), (c), (d) and (j). See also *Brækhus* 1. c. pp. 482-97.

Special difficulties arise where one or both of the colliding ships limit their liability. In the relationship between the ships, the limitation will, under the laws of most countries, first be applied in respect of the liability balance, in other words, on the basis of the single-liability principle, cf. Article 5 of the Limitation of Liability Convention of 1976 and Section 172, last sub-clause, of the Norwegian Maritime Code. In consequence hereof, the calculated gross liability will not concord with the balance which is in actual fact paid, and the normal cross-liability settlement in the relationship between the shipowner and his insurers will not be correct. In English marine insurance, which is based on cross-liability as the principal rule, this has led to a switch to single liability as soon as one of the involved ships limits its liability, cf. I.T.C., Hulls, no. 8.2.1. However, this solution results in an unfortunate discontinuity. An insignificant increase in liability, making limitation applicable, may result in a very substantial reduction of the reimbursement of the owner's loss of time. Danish and Norwegian practice has instead adopted a modified cross-liability settlement in the limitation cases by reducing the largest gross amount of liability in the insurance settlement by the same amount by which the liability balance in the external settlement has been reduced as a result of the limitation rule, see further *Brækhus*, 1. c., pp. 469-82 and 497 *et seq.* This method of settlement was also approved by the Norwegian Supreme Court in the FERNSTREAM case, ND 1963.175, and it is explicitly adopted as a basis in the Plan, cf. Cl. 4-14, *second sentence*. For the sake of clarity, the *third sentence* of the Clause specifies how the settlement shall be effected when the limitation is applied to the liability balance.

Incidents causing mutual damage and liability that affect the insurance settlements do not occur only in connection with collisions between ships, although collision cases are probably predominant. The cross-liability principle must also be applied in a case such as the following: a cargo of slimes which is carried by the insured ship becomes liquid. The ship, which does not have the necessary longitudinal bulkheads, takes a list and ends up turning over and going down. The accident was due partly to negligence of the cargo owner: he had failed to say that the slimes were of a particularly difficult type, and partly to negligence of the ship: even when carrying ordinary slimes, the ship should have had

longitudinal bulkheads. In the claims settlement, the cargo owner's (partial) liability for the loss of the ship will, to some extent, be offset by the owner's (partial) liability for the loss of the cargo. In the ensuing insurance settlement, the balance must be broken down as follows: the compensation the cargo owner pays for the loss of the ship must be covered by the hull insurer, while the compensation to the cargo owner for the loss of the cargo must be paid by the P&I insurer.

In the above example, it is assumed that both the assured's own loss and his liability to third parties are covered by insurance. However, the cross-liability principle must be applied, even if it is only the assured's own loss, or only the liability, which is insured. The individual insurer's liability shall not depend on how the assured has covered his other interests. For this reason, the application of the cross-liability principle has been authorised specifically with a view to liability insurance in this Clause and with a view to the apportionment of subrogation claims in Cl. 5-13, sub-clause 1, second sentence.

#### **Clause 4–15. Unusual or prohibited terms of contract**

This Clause is identical to Cl. 76 of the 1964 Plan.

The collision liability covered by the hull insurer will normally have been incurred vis-à-vis a third party with whom the assured does not have any contractual relationship. However, it is conceivable that the assured's contracts may be of significance, especially in connection with liability to owners of tugboats or quays, canals and similar installations the ship has used.

Under *sub-sub-clause (a)*, the insurer shall always cover liability based on terms of contract that must be considered customary in the trade concerned. In offshore contracts, it is customary to use limitations of liability in the form of “knock-for-knock” clauses, which entail that the contracting parties shall cover damage to their own objects, even if the other contracting party may be held liable for the damage under general law of damages. Such clauses must in this context be considered “customary”. However, limitation of liability clauses in offshore contracts are often linked to a waiver-of-subrogation clause in the claimant's insurance contract, whereby the insurer waives the right to seek recourse against the assured's contracting counterpart. In that event, the question whether such limitation of liability clauses are customary is of little independent significance.

The limitation of liability in *sub-sub-clause (b)* relates to Cl. 3-28, which authorizes the insurer to prohibit or require the use of certain contractual forms.

In contracts for repairs, it is not unusual to find clauses to the effect that everything that is scrapped during repairs shall accrue to the repair yard, without compensation. Such clauses are also binding on the insurer according to custom and practice and by analogy from Cl. 4-15, cf. *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 603-604.

## Clause 4–16. Objects belonging to the assured

This Clause is identical to Cl. 77 of the 1964 Plan.

If two of the assured's ships collide, the ships' hull insurers will cover the damage they have sustained. If the ships had belonged to different legal entities, the ship that was at fault would have also had to cover the other ship's loss of time, deductions, deductibles concerning the hull damage and other financial losses that the owner has suffered because of the collision. This liability would normally have been covered by the hull insurer of the ship at fault. No such liability can arise when both ships belong to the same person. The assured will suffer a corresponding reduction in his cover and the hull insurer of the ship at fault will not be liable for loss of time, etc. for which he otherwise would have been liable. This is not reasonable. The Plan therefore prescribes, in conformity with earlier law, that a fictitious collision settlement shall be effected between the ships. Compensation shall be calculated as if they had belonged to different persons. This "sister-ship rule" is customary in international marine insurance.

The same applies where the ship has run into other objects belonging to the assured, e.g., a quay or a wharf. In this case, the insurer shall cover the liability the assured would have incurred if the quay or wharf had belonged to a third party, based on the view that the insurer's liability should not be reduced because of the coincidence that the ship has run into the assured's own property.

The sister-ship rule represents a positive extension of the liability cover. Hence, it cannot be invoked against an insurer who has only insured the "innocent" ship. He will only be liable for the ship's hull damage in accordance with the insurance contract. On the other hand, liability under this provision for the insurer of the ship at fault is subject to the condition that he would have been liable under the rules of the Plan if the claimant had been an outside third party. Accordingly, if the insurer would not have been liable for the collision liability, etc., on account of the rules in Chapter 3, including the identification rules, he will also be free from liability to the assured under the current provision.

Another question is whether the insurer of the "innocent" ship will have recourse against the assured in his capacity as owner of the ship at fault. The question is first and foremost of interest when the ship at fault is not insured and is, accordingly, not of any great practical significance. The correct solution must be that his position as assured under the innocent ship's insurance protects him against such a recourse claim to the same extent that he has a claim against his own insurance. This means that it is the general rules in Chapter 3 of the Plan which decide the question.

If a fault was committed on board both of the colliding ships, the application of the sister-ship rule must be "based on the calculated gross liabilities before any set-off", cf. Cl. 4-14.

The extended cover under Cl. 4-16 applies only to loss of or damage to objects other than the insured ship and its supplies and equipment, cf. second sentence. Damage to such objects is not recoverable under these rules.

A corresponding “sister-ship rule” is applied when the ship is salvaged or receives assistance from another vessel belonging to the assured, cf. Cl. 10-11.

### **Clause 4–17. Determination of the liability of the assured**

This Clause corresponds to relevant Nordic Insurance Contracts Acts (Nordic ICAs). Cl. 4-17 was editorially amended in the 2013 Plan in order to better safe guard against non-Nordic courts allowing a direct action against the insurer.

The Nordic ICAs contain a provision which gives an injured third party a direct claim against the tortfeasor’s liability insurer. This provision is not appropriate in marine insurance. Consequently, for insurances taken out on the basis of the Plan, an injured third party will have no such right to direct action. This is reflected in *paragraph 1* of the provision. However, an injured third party under the relevant Nordic ICAs is protected against the compensation being paid to the assured without the latter having proved that the injured party’s claim has been honoured. Furthermore, the injured party will have a direct claim against the insurer if the assured is insolvent, cf. Section 7-8, second paragraph. These provisions are mandatory in marine insurance as well, cf. the relevant Nordic ICAs.

*Sub-clause 2* sets out a number of procedures the assured may follow in order to document his claim. The deciding factor for the insurer’s obligation to indemnify the assured is, however, that the claim is justified, not that the relevant procedure has been complied with. This is reflected in *sub-clause 3*. Consequently, if the assured has, contrary to the umpire’s decision, cf. Cl. 5-11, accepted that a dispute shall be decided by arbitration, the insurer must cover the assured’s liability under the arbitration decision, provided that the assured is able to prove that he would have incurred liability even if he had complied with the umpire’s decision, cf. *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 572.

## **Section 4**

### **The sum insured as the limit of the liability of the insurer**

#### **Clause 4–18. Main rule**

This Clause corresponds to Cl. 79 of the 1964 Plan, and Cefor I.3 and PIC Cl. 5.7.

This provision establishes the principle that the insurer is liable up to the sum insured for each individual casualty, and shall apply in all branches where a sum insured is agreed.

*Sub-clause 1, first sentence*, is based on Cl. 79 of the 1964 Plan, sub-clause 1. The insurer is liable with up to one sum insured for “loss caused by any one casualty”. The term “any one casualty” is discussed in further detail below.

*Sub-clause 1, second sentence*, is based on the Special Conditions (Cefor I.3, and PIC Cl. 5.7), but with certain amendments. The provision is bound up with the traditional principle in insurance law that the insurer, in addition to the sum insured, is liable for costs of measures to avert or minimise loss. Under the 1964 Plan, the insurer originally had unlimited liability for these costs. However, this liability was limited in the Special Conditions (Cefor I.3, and PIC Cl. 5.7) so that the costs of measures to avert or minimise loss basically had to be covered up to the sum insured under Cl. 79, sub-clause 1, or possibly the separate sum insured under Cl. 196. There was nevertheless a certain extension of the cover: if the separate sum insured under Cl. 196 of the Plan was not used to cover costs of collision or measures to avert or minimise such liability, the balance could be used to cover costs of measures to avert or minimise damage to or total loss of the ship to the extent that such measures exceeded the sum insured.

According to this, the cover under the Special Conditions of costs to avert or minimise loss were more limited than the corresponding cover under the relevant Nordic Insurance Contracts Acts (Nordic ICAs). Under the Norwegian ICA Section 6-4, the rule is that the insurer is fully liable for costs of measures to avert or minimise loss. During the revision of the Plan, there was general agreement that the limitation in the Special Conditions went too far. The intention was originally that the P&I insurers were to cover the costs of measures to avert or minimise loss which were not recoverable under the hull insurance. However, this applied only to the Norwegian P&I insurers, and the assured therefore ran the risk of being without cover if he had a foreign P&I insurer. Nor was the solution laid down in any agreement, and it was therefore uncertain to what extent it would be complied with in practice. The regard for the interests of the assured therefore warranted a certain expansion of the scope of cover. Out of regard for the reinsurers, however, cover of costs of measures to avert or minimise loss had to be subject to a limitation. These conflicting interests have been resolved by the introduction of a separate sum insured for the costs of measures to avert or minimise loss stipulated in sub-clause 1, second sentence. This sum insured comprises the total costs of measures to avert or minimise loss for the relevant insurance under the Plan. For hull insurance, this means that both costs of measures to avert or minimise loss associated with the property insurance, as well as costs of measures incurred to avert collision liability, are included. The insurer’s maximum liability for one and the same casualty thus consists of three sums insured. Such a solution concords with the solution in the English conditions.

If the sum insured for property damage under a hull insurance has not been exhausted by compensation paid for such damage, it should be possible to use the excess of the sum insured to cover

costs of measures to avert or minimise loss that exceed the separate sum insured for such costs.

This solution is reflected in sub-clause 1, *third sentence*. On the other hand, it should not be possible to transfer the separate sum insured for the collision liability under sub-clause 2 and Cl. 13-3 for the purpose of covering costs of measures to avert or minimise loss in this way. The provision relating to a separate sum insured for collision liability contained in *sub-clause 2* and Cl. 13-3 is bound up with the regulation of the owner's liability. According to the Limitation of Liability Convention of 1976, the owner is liable up to a certain amount per ton, regardless of the fate of the ship. Without a separate sum insured for collision liability, collisions causing extensive damage to both ships may result in the P&I insurer having to cover a substantial part of the collision liability.

The fact that the insurer covers collision liability "separately" means that he does not cover collision liability within the actual hull insurance sum. Thus, whatever might be left of the ordinary sum insured after the damage to the ship has been covered shall not be used to cover liability. The separate sum insured for collision liability has been fixed at an amount equal to the sum insured under the hull insurance, cf. Cl. 13-3.

It follows from the regulation in Cl. 4-18 that the limit in terms of amount of the insurer's liability is linked to "any one casualty". The question whether one or more casualties occurred will rarely give rise to problems. Difficulties do not arise until a series of events occur in rapid succession or with a strong mutual causal connection. In that event, the distinction between one and several casualties must be decided on a case-to-case basis. Some guidance may be found in practice in connection with Cl. 12-18 concerning deductibles; the deductible, too, shall be calculated for each individual casualty. However, the content of the casualty concept will not necessarily be the same in both connections.

The question as to when successive events constitute one or more casualties may arise in three standard scenarios:

1. One and the same peril materializes several times. By way of example, a ship sustains hull damage while navigating in ice on a number of clearly separate occasions, cf. e.g. ND 1974.103 NH *SUNVICTOR*, which concerned the question relating to the number of deductibles under an Anglo-American deductible clause. As a rule, this problem will concern the number of deductibles. The ship will normally be a constructive total loss if several incidents of damage exceed the sum insured. However, in principle it may in such situations also be a question whether the insurer shall be liable for up to more than one times the sum insured.

2. Damage caused by one event interacts with new circumstances and results in further damage. By way of example, the steering gear of a ship is damaged in a collision with the result that the helm is locked in a starboard position. Before the crew manages to stop the engine, a new collision occurs. As regards property-damage cover, in this group of events as well, it will be the question of

deductibles which is the most interesting. However, in the event of several successive collisions, the total collision liability may become so extensive that the question of whether the insurer is liable for up to one or several times the sum insured becomes relevant.

3. One incident of damage requires several repairs. The typical example is that the first repairs were inadequately performed, or that they were not thorough enough, cf. ND 1977.38 NH VESTFOLD I, which concerned the question whether new damage resulting from errors committed during the repairs of the engine after a grounding was to be regarded as a consequence of the grounding. If the first damage has been repaired before the next one occurs, there may also be a need for more than one sum insured.

There is no case law regarding the distinction between one and several casualties in relation to the sum insured. Certain elements may be taken from ND 1974.103 NH SUNVICTOR and ND 1977.38 NH VESTFOLD I, cf. above. In addition, some guidance may be found in case law concerning limitation of liability under Section 175 no. 4 of the Norwegian Maritime Code, which ties the limit of liability to “the sum total of all claims arising from one and the same event”. If it is a situation where the ship collides with several other ships in quick succession, causing a total loss exceeding the sum insured for the collision liability, the natural thing to do would be to tie the solution to the decision regarding the owner’s right to limit his liability to third parties. However, also in other cases where a limitation of liability under the Norwegian Maritime Code is relevant, the interpretation of the term “one and the same event” in the Norwegian Maritime Code may help shed some light on the question concerning the distinction between one and several casualties in relation to the sum insured. Reference is made to ND 1984.129 NH TØNSNES, where damage to seven net loops in the course of roughly one hour was regarded as caused by one event; and ND 1987.160 NH NY DOLSØY, where it was regarded as one event that contaminated bunkers delivered at an interval of 24 hours to two ships within the same fishing area caused damage to the machinery of these vessels.

Accordingly, the question whether one or several casualties have occurred in relation to the sum insured must be the subject of a case-to-case evaluation, where the following elements may come into play:

1. Is there a close connection in terms of location and time between the successive incidents of damage, or are the new accidents of a totally independent nature? Taking the two limitation of liability judgments referred to above as a point of departure, it is nevertheless hardly possible to stipulate very strict requirements as to connection in time and place in order for several incidents of damage to be regarded as one casualty. As long as the incidents occur within a limited area, it must be accepted that they occurred at certain intervals.

2. What possibilities did the assured have of averting the last damage? As regards this element, a distinction must, however, be made between the number of deductibles and the number of sums insured. If it is a question of whether new damage shall trigger several deductibles, the assured's negligence must be regarded as a new and independent cause that breaks the chain of causation from the first incident. This follows from the view that the deductible shall have a deterrent effect. However, in relation to the number of sums insured, the deterrence aspect may suggest that negligence on the part of the assured does not give rise to a new sum insured. Deterrence considerations might, in other words, warrant varying the distinction between one and several casualties depending on whether it is a question of more than one sum insured or more than one deductible.
3. Does the initial damage or its cause entail an increased risk of new damage, or is the last incident a result of a "generally prevailing risk of damage" which would have occurred with the same effect independently of the first damage or its cause?

#### **Clause 4-19. Liability in excess of the sum insured**

This Clause corresponds to Cl. 80 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts.

It is a traditional principle in marine insurance that the assured, in addition to the cover which the insurance affords him within the limits of the sum insured, is entitled to separate cover of a number of accessory expenses and other losses which the casualty has caused him. In the 1964 Plan, all these expenses were stated in Cl. 80. In the new Plan, loss caused by measures to avert or minimise loss has been isolated for separate regulation in Cl. 4-18, cf. above. The other accessory costs, however, are still mentioned in Cl. 4-19.

*Sub-clauses (a) and (b)* state the expenses that are to be covered in addition to the sum insured: costs of providing security, of filing suit against or defending a suit filed by a third party, costs in connection with the claims settlement, costs of necessary measures to preserve the object insured and interest on the compensation.

It furthermore follows from Cl. 15-21, which concerns liability for the removal of war wrecks that the war-risks insurer covers such liability even if the sum insured is exceeded.

#### **Clause 4-20. Limit of liability where loss is caused by a combination of perils**

This Clause corresponds to Cl. 81 of the 1964 Plan.

The provision is based on ND 1956.323 NH PAN, where the question was how the limitation up to the sum insured was to be applied in the event of a casualty with a "mixed cause". Liability for the damage to the ship was apportioned, with the marine insurer covering 40% and the war-risks insurer

60%. The costs of repairs, etc. exceeded the hull valuation, but the assured demanded full compensation, alleging that each of the insurers was liable for his share of damage to the ship up to his sum insured. The Supreme Court rejected the claim on the grounds that the assured shall not “in a case of a combination of different perils, be in an economically more advantageous position than if there had been no combination of different perils”. This solution has been adopted as a basis in Cl. 4-20.

#### **Clause 4-21. Right of the insurer to avoid further liability by payment of the sum insured**

This Clause corresponds to Cl. 82 of the 1964 Plan.

Under *sub-clause 1*, the insurer may avoid further liability by paying the sum insured. There is no time-limit on the insurer’s right to limit his liability.

The principle in sub-clause 1 is only applicable in property insurance. The insurer cannot invoke the provision if the assured, contrary to his wishes, wishes to institute legal proceedings regarding liability covered by the insurance. In that case, it is necessary to resort to the rules contained in Cl. 5-11. If the assured in such a case is supported by the umpire, but liability which absorbs the entire sum insured is nevertheless imposed on the assured in the legal proceedings, the insurer shall cover the litigation costs under the general rules.

If the insurer pays the sum insured in accordance with Cl. 4-21, the further salvage operation will be for the assured’s own account and risk. If the salvage operation is successful, the assured will keep the wreck, but he must pay the full cost. However, he may claim compensation for the costs he has incurred before he was informed that the insurer had decided to pay the sum insured, cf. *sub-clause 2*. The measures the assured has implemented prior to that time are for the insurer’s account, even if the costs do not accrue until later.

This apportionment of risk has caused certain problems where the assured has entered into a salvage contract before the insurer has paid the sum insured. If the contract does not allow the assured to cancel the contract without paying salvage, the insurer will be liable for the salvage expenses; here the measure has been “implemented”, cf. sub-clause 2. If, however, the assured has the right to get out of the salvage contract, the insurer has the right to order him to do so, and may in that event pay the sum insured according to sub-clause 1, and avoid further liability. These principles must apply regardless of whether the salvage contract has been entered into on a no-cure-no-pay basis or is based on an hourly rate.

Sub-clause 3 establishes that the insurer has no right to take over the object insured under Cl. 5-19, where he chooses to pay the sum insured under sub-clause 1.

## Chapter 5

### Settlement of claims

#### Section 1

#### Claims adjustment, interest, payments on account, etc.

##### **Clause 5-1. Duty of the assured to provide information and documents**

This Clause corresponds to Cl. 83 of the 1964 Plan, Cefor I.29, and PIC Cl. 5 no. 8, and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

*Sub-clause 1* is identical to the 1964 Plan. The provision establishes the duty of the assured to provide the insurer with such information and documents as are required for the purpose of settling the claim. It is irrelevant whether the insurer has specifically requested such information; the duty concerns any and all information the insurer, from an objective point of view, requires. The duty of disclosure applies both in relation to the claims leader and in relation to the co-insurers.

In practice, the insurer often raises a number of specific questions related to the settlement. Incorrect answers to these questions represent a clear breach of Cl. 5-1, sub-clause 1. However, the provision shall also apply where the assured, on his own initiative, gives incorrect information or withholds information which he should understand is of significance for the insurer. The duty of the assured to provide information is, in other words, an active and not a passive duty of disclosure.

The requirement to provide information may vary in the different types of insurance. In loss-of-hire insurance, the duty of disclosure under Cl. 5-1 entails that the assured shall make all accounting material that shows the ship's earnings, relevant bills, invoices, etc. available to the insurer in so far as this is necessary in order to calculate the correct compensation.

If the assured fails to fulfil his duty under sub-clause 1, he risks forfeiting his right to claim interest for the time lost, cf. Cl. 5-4, sub-clause 2. However, loss of interest would normally only be a reasonable sanction where the assured has failed to comply with an explicit request from the insurer for a specific item of information or a specific document. However, an exception must be made for the general invoice. If the assured fails to submit this, he risks forfeiting his right to claim interest under Cl. 5-4, sub-clause 2, even if he has not received any specific request from the insurer.

*Sub-clause 2* is new and regulates the insurer's sanctions if the assured, intentionally or through gross negligence, breaches the duty to provide information stipulated in sub-clause 1. The 1964 Plan did not

contain any sanctions against the intentional or grossly negligent breach of this duty of disclosure, although sub-clauses 2 of Cl. 92 and Cl. 99 (cf. currently sub-clauses 2 of Cl. 5-9 and Cl. 5-16) of the 1964 Plan contained such sanctions for certain special situations. However, there is no reason why the failure to fulfil the general duty to provide information under Cl. 5-1 should result in a more lenient reaction than the failure to comply with the other provisions. Accordingly, sub-clause 2 establishes that, in the event of the assured, intentionally or through gross negligence, breaching the duty of disclosure, the insurer is not liable for any loss that would have been averted if the duty had been fulfilled.

If the assured has acted fraudulently in connection with the claims settlement, the traditional point of departure in insurance law is that the assured forfeits any claim against the insurer. This point of departure had been softened in the 1964 Plan, where Cl. 83, sub-clause 2, merely stated that compensation might be reduced or lapse altogether where the assured had fraudulently or dishonestly failed to fulfil his duty of disclosure. However, this provision was considered unfortunate in practice, and the alternative, a reduction of liability was therefore abolished in the Special Conditions, cf. Cefor I.29 and PIC Cl. 5.8, which stated that liability lapsed where the assured had fraudulently or dishonestly breached the duty of disclosure. The solution in the Special Conditions has been maintained in the new Plan, cf. *sub-clause 3, first sentence*. This rule may seem strict if the fraud is of secondary importance and concerns only certain losses, and there is consequently a risk that the courts may in such cases fail to hold that fraud has been committed. However, the loss of all rights concords with the point of departure in the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

In the 1964 Plan, fraud was placed on a par with “dishonesty”. This is in accordance with the solution in the Norwegian ICA, which applies to an assured who, in connection with a claims settlement, deliberately gives incorrect or incomplete information which he knows or must understand may result in the payment of a compensation to which he is not entitled. This solution has not been maintained in the new Plan, under which a total loss of rights will only be relevant in the event of fraud. This is the most consistent procedure in relation to the other rules relating to subjective duties, and also makes it unnecessary to decide the difficult question as to what the term “dishonest” implies.

Cl. 83, sub-clause 2, second sentence of the 1964 Plan equated fraud and dishonesty with the situation where the assured refused to provide information from the classification society. This rule has been amended and moved to Cl. 3-7, sub-clause 3.

Sub-clause 3, *second sentence*, is new and gives the insurer the right to cancel any agreement with the assured by giving 14 days’ notice if the assured has acted fraudulently. This provision is taken from the Norwegian ICA Section 8-1, third paragraph, although that Section stipulates only one week’s notice. Because it is important that the assured be given clear information as to where he stands as

soon as possible, it follows from the *third sentence* that the insurer shall act without undue delay after he has become aware of the fraudulent act, cf. the corresponding rule in Cl. 3-6.

## **Clause 5-2. Claims adjustment**

This Clause corresponds to Cl. 84 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs). The Commentary was amended in the 2010 version.

The *first sentence* to the effect that the insurer shall issue the claims adjustment as promptly as possible is identical to the 1964 Plan. However, the second sentence of the 1964 Plan contained more detailed time-limits: in the event of a settlement under the rules relating to a total loss, the claims adjustment was to be issued at the latest within 14 days, and in other cases at the latest within three months after the insurer had received the necessary information and documents. The provision was connected with Cl. 89 relating to due dates, which was tied to the time-limits in Cl. 84 and Cl. 86 relating to interest, which authorized penalty interest plus 1% in relation to the ordinary rate of interest if the due date is not adhered to. However, in the Special Conditions the system of interest on overdue payments had been superseded by a common rate of interest.

The approach of the new Plan is to establish a due-date and interest system that is somewhere in between the solution in the 1964 Plan and the solution in the Special Conditions. On the one hand, there is reason to show caution when it comes to imposing interest on overdue payments. The sharp calculation of time-limits in Cl. 84, sub-clause 1, second sentence, of the 1964 Plan has therefore been taken out of the Plan text and does not have any direct impact on the due date. The insurers should nevertheless endeavour to meet a deadline of 14 days for total losses and three months for other settlements.

On the other hand, a common rate of interest before and after the due date will not give the insurer very much of an incentive to be quick about the claims adjustment if the market rate is higher than the rate in the insurance contract. The possibility cannot be disregarded that the courts may in such a situation apply the Act relating to interest on overdue payments (for Norway *Morarenteloven*), even if the Plan did not contain any rules relating to interest on overdue payments. The due date in Cl. 5-6 therefore refers to the criterion “as promptly as possible” in Cl. 5-2, first sentence, and a rule relating to interest on overdue payments has been introduced in Cl. 5-4, sub-clause 4. An insurer who fails to pay compensation within six weeks after the “as promptly as possible” period has expired must pay overdue interest.

The provision in the *second sentence* has been taken from Cl. 84, sub-clause 2, first sentence of the 1964 Plan. The insurer has been given a general right to engage an average adjuster to carry out the claim adjustment on his behalf. The 1964 Plan also contained a provision to the effect that the insurer

had one month to decide whether or not to accept the average adjuster's calculation. This rule was deemed to be superfluous and has been deleted.

The assured does not have a right equivalent to that of the insurer to require that the adjustment is made by an average adjuster. However, there is nothing to prevent the parties from making an explicit agreement that the assured shall be given such a right.

### **Clause 5-3. Rates of exchange**

Sub-clauses 2 and 3 was amended in the 2013 Plan to abolish the reference to "Norwegian Kroner" (NOK). The wording of paragraph 2 and 3 below was edited to clarify the relevant points. It is standard international practice that the conversion from one currency to another in the claims adjustment is based on the rate of exchange on the date of the assured's disbursement, cf. *sub-clause 1, first sentence*. This means that the assured bears the exchange risk for the period of time between the disbursement and the final claims settlement.

As regards general average, it is standard international practice for the conversion of currencies to be based on the rate of exchange on the date of disbursement. If, in exceptional cases, a different rate of exchange has been applied, the insurer has the right to apply for change of the actual average adjustment. If the adjustment is confirmed by the courts of the country concerned, the settlement should be made on the basis of the average adjustment.

*Sub-clause 2* regulates the conversion of costs that have not been paid when the adjustment is issued. The adjustment is "issued" when the completed adjustment is sent from the insurer to the interested parties. Hence, if there is a change in the rate of exchange during the period from the time the actual adjustment is issued until payment is made, this currency risk must be born by the assured.

*Sub-clause 3* regulates the conversion of deductible and other amounts in the insurance contract if the sum insured is stipulated in a currency other than the currency stipulated for the deductible etc.; the conversion to the currency of the sum insured is based on the banks' latest official selling rate before the insurance took effect. The meaning of "the insurance attaches" is further regulated in Cl. 1-5 of the Plan. The time at which it takes effect poses no problems for ordinary insurance **contracts** which attach for one year. If it has been agreed that the insurance shall attach for a period longer than one year, it follows from Cl. 1-5, sub-clause 4, that the insurance period shall be deemed to be one year in relation to Cl. 5-3, sub-clause 3. The further calculation of the period of insurance in such cases is shown in the Commentary on Cl. 1-5.

#### Clause 5-4. Interest on the compensation

Sub-clauses 3 and 4 were amended in the 2013 Plan. **Sub-clause 3 was further amended in the 2019 Version.**

In the event of a total loss, it is the notice of the casualty, and not the claim for total loss, that forms the basis of the duty to pay interest. This also applies to condemnation, even if it takes a long time to decide the question of condemnation. If the matter is delayed because the assured is late in submitting the request, the question of applying the rule in sub-clause 2 may arise.

Under Cl. 11-7, sub-clauses 1 and 2, the assured's right to compensation for total loss will, in certain cases, be contingent on the expiry of a certain time-limit. However, under Cl. 11-7, sub-clause 3, he may claim compensation without awaiting the expiry of the time-limit if he can prove that he will not recover the ship. In such cases, the obligation to pay interest will accrue one month after the assured proves that he has definitively lost the ship.

In the event of the insurer having to refund the assured's disbursements, interest does not accrue until the date of the disbursement, cf. sub-clause 1, *second sentence*. Thus, no interest is charged on costs that have not yet been incurred.

If the assured has had disbursements at different times, interest shall be calculated separately for each disbursement. In such cases, the deductible shall be apportioned over the various disbursements on a proportional basis so that the assured can only claim interest on that part of the disbursement which exceeds the relevant proportion of the deductible, cf. the Commentary on Cl. 12-18.

Sub-clause 1, *third sentence*, states that in the case of loss-of-hire insurance the interest accrues from one month after expiry of the period for which the insurer is liable. There is no reason why the duty to pay interest shall be postponed until the repairs have been completed if the insurer's liability is limited to a shorter period.

The provision in *sub-clause 2, first sentence*, regulates the duty to pay interest if the assured fails to provide information under Cl. 5-1; in that event, he cannot claim interest for the loss of time resulting from the delay.

By making payments on account the insurer will, to a large extent, eliminate the duty to pay interest. If the assured refuses to accept such payments on account, or if he unrightfully refuses to accept settlement, wholly or in part, he cannot claim interest for the resulting loss of time, cf. sub-clause 2, *second sentence*.

**Sub-clause 3 was amended in 2019 to protect the interest of the assured in a situation with negative interest rates. The effect of the amendment is that the assured shall as a minimum receive 2 percentage points interest per annum. The practical main rule will still be the established** calculation system where **sub-clause 3** automatically reflects the general level of interest at the time in question **by tying** the rate of interest to CIBOR (Copenhagen Interbank Offered Rate) if the sum insured is given in Danish Kroner, NIBOR (Norwegian Interbank Offered Rate) if the sum insured is given in Norwegian Kroner or STIBOR (Stockholm Interbank Offered Rate) if the sum insured is given in Swedish Kronor, and LIBOR (London Interbank Offered Rate) if the sum insured is in some other currency, cf. *sub-clause 3, first sentence*. By CIBOR, NIBOR and STIBOR is meant the interest offered by the leading banks in the respective Nordic countries for interbank loans in DKK, NOK or SEK for the interest period in question in the respective interbank markets, i.e. the market where the banks can obtain deposits in Danish Kroner, Norwegian Kroner or Swedish Kronor, respectively through the international swap market. CIBOR, NIBOR and STIBOR will vary depending on the life of the loans. In the Plan, the six-month CIBOR, NIBOR and STIBOR has been adopted as a basis, because it is somewhat more stable than the three-month rate of interest.

If the sum insured is in another currency, the six-month LIBOR shall be used. By LIBOR is meant the rate of interest determined for interbank loans in the relevant currency for the corresponding period in the London Interbank Market. The rate of interest is determined at 11:00 a.m. London time with effect from and including spot, i.e. two banking days after the setting of the rate of interest. Average rates of interest for various periods are readily available in all major banks.

The mark-up on CIBOR, NIBOR, STIBOR and LIBOR is calculated at 2 **percentage points**.

As regards the time to which the rate of interest shall be tied, there are basically three alternatives. The rate of interest may be tied to the time when compensation is paid. This is the logically correct solution, but it is complicated, because it is necessary to calculate the interest for each individual payment. Another alternative is to tie the interest to the time of loss. This solution is also complicated, however: there will be a rate of interest for each insured event, and it may also be difficult to pinpoint the individual incident in time. A final alternative is to tie the rate of interest to the time the insurance contract attaches. This is the simplest solution, and the one on which the Plan is based, cf. *sub-clause 3, second sentence*. The rate of interest shall be determined as at 1 January “of the year the insurance contract comes into effect”. By this is meant the time when the individual insurance contract takes effect. If the insurance has been renewed with the same insurer, the time of renewal is decisive. The time when the insurance contract comes into effect poses no problems for ordinary insurance contracts which attach for one year. If it has been agreed that the insurance shall attach for a period longer than one year, Cl. 1-5, sub-clause 4, which was added in the 2003 version, provides that the insurance period shall be deemed to be one year in relation to Cl. 5-4, sub-clause 3. The calculation of the insurance period is explained in further detail in the Commentary on Cl. 1-5. In order to prevent

the rate of interest becoming dependent on major, random fluctuations in the market, the applicable rate is the average rate of interest for the last two months of the year preceding the attachment of the insurance contract. The relevant average rate of interest will be calculated on request by most banks. The Nordic Association of Marine Insurers (Cefor) publishes on its web-site early January every year the applicable rates for the most important currencies.

*Sub-clause 4* was amended in 2013 to abolish the reference to the Norwegian Interest Act. Instead the rate for overdue payments is to be the same rate as in sub-clause 3 with an addition of 2 **percentage points**. This amendment will further facilitate calculation of interest on overdue payments. **The effect of the amendment to sub-clause 3 in the 2019 Version is that the rate for overdue payments as a minimum will be 4 percentage points.**

Pursuant to Cl. 4-19 (b), interest shall be covered in addition to the sum insured.

If the claims leader has had disbursements on behalf of the insurers, he will be entitled to charge interest under Cl. 9-11.

## **Clause 5–5. Disputes concerning the adjustment of the claim**

Sub-clause 1 of this Clause was amended and a new sub-clause 4 was added in the 2013 Plan.

*Sub-clause 1* sets out a right for both parties to demand that the adjustment be submitted to a Nordic average adjuster before the matter is brought before the courts. The average adjuster shall not make any arbitration award, but merely give his opinion as to how he believes the claims settlement should be effected. Experience shows that this provision has had a litigation-detering effect, because the assured will often accept the opinion of the average adjuster he has designated himself even if he does not support his claim. The insurer too will normally accept an average adjuster's decision that is not in his favour.

The last sentence in sub-clause 1 is new in the 2013 Plan, and states that the insurer may appoint the adjuster if the assured fails to do so. There have been cases where the assured refuses to appoint an adjuster even if the insurer so request. In such cases the insurer may either leave it to the assured to pursue his claim before the competent courts, or appoint an adjuster on his own. It has then been argued by the assured that the opinion issued by an adjuster appointed by the insurer should not be given any weight. It seems unreasonable that the assured in this way may interfere with the insurer's right to get an opinion from a Nordic adjuster pursuant to Cl. 5-5.

*Sub-clause 2* states who shall bear the costs of submitting the matter to an average adjuster. When the average adjuster submits his opinion, he must also decide this question. The costs of submitting the

case to an average adjuster comprises first and foremost the adjuster's fee. The adjuster may also incur costs by appointing or consulting with experts of his own choice previously not involved in the case. Also such costs as well as any other expenses the adjuster may have incurred must be deemed costs that shall be distributed according to sub-clause 2. The costs incurred by the parties must be distributed according to Cl. 4-5. The adjuster may if so requested by any of the parties also render an opinion on distribution of the costs incurred by the parties.

Even if no claims adjustment exists, there may be grounds for litigation between the assured and the insurer, *viz.* when the latter has refused a request for condemnation, or has repudiated a claim on the ground that no recoverable casualty has taken place. *Sub-clause 3* makes the provisions contained in sub-clauses 1 and 2 similarly applicable to such situations.

If the assured and the insurer, after having obtained the average adjuster's opinion, cannot reach an agreement about the claims settlement, the dispute must be referred to the ordinary courts or to arbitration if so agreed.

*Sub-clause 4* is new in the 2013 Plan and contains a special rule for adjustments when the insurance contract is subject to Finnish or Swedish law. The reason for the provision is that under Section 1 of the Finnish Act of 16 January 1953 relating to official adjusters and the Regulation of 6 March 1936 relating to the activities of the adjusters any disputes under insurance contracts must be placed before the official Finnish adjuster before the matter can be brought before a Finnish court. Thus in such disputes governed by Finnish law the official Finnish adjuster will be the mandatory first instance.

Under Chapter 17, Section 9 of the Swedish Maritime Code (1994:1009), cf. Chapter 10, Section 17 of the Swedish Administration of Justice Act all marine insurance disputes must be placed before the official Swedish adjuster before the matter can be brought before a Swedish court. Thus in such disputes governed by Swedish law the official Swedish adjuster will be the mandatory first instance. By judgment of 11 December 2009 the Gothenburg first instance court (Göteborgs tingsrätt) confirmed that the law is mandatory also for disputes on insurance of pleasure boats.

Thus, if the individual contract is subject to either Finnish or Swedish law, the free choice of one of the Nordic adjusters pursuant to Cl. 5-5 is restricted in the sense that no party can bring suits before the Finnish or Swedish courts if a Danish or Norwegian adjuster has been appointed pursuant to Cl. 5-5. The parties may still ask for an opinion from either a Danish or Norwegian adjuster if they wish to incur the potential extra costs of an opinion from one of these adjusters in addition to the opinion from either a Finnish or Swedish adjuster required if the matter does not settle and has to be brought before either a Finnish or Swedish court.

## Clause 5–6. Due date

The time-limit was changed from six to four weeks in 2016.

The time-limit takes effect from the time the claims adjustment “is or should have been issued”, cf. Cl. 5-2 for further details. If the time-limit is exceeded, the calculation of interest will be affected, cf. Cl. 5-4, sub-clause 4.

## Clause 5–7. Duty of the insurer to make a payment on account

This Clause corresponds to Cl. 90 of the 1964 Plan. The provision has a parallel in ICA Section 8-2, second paragraph, which provides that the insurer shall make a payment on account if it is clear that he is liable for at least part of the claim.

*Sub-clause 1, first sentence*, gives the assured contractual entitlement to a payment on account.

In Cl. 90 of the 1964 Plan, the obligation to make a payment on account to the assured was made subject to “substantial disbursements to cover loss”. This has been amended to “major expenses or losses” in order to emphasize that this duty also applies to loss-of-hire insurance. The duty to make payments on account applies only to “major” expenses or losses; in that event, the assured is entitled to an “appropriate” payment on account. The criteria are discretionary, and leave a lot of latitude. If the assured requests a payment on account concerning expenses which he has not yet paid, the insurer has the right to pay the amount directly to the third party in question, cf. *second sentence*.

However, an unconditional legal duty to make payments on account may not be advisable for the insurer. If he refuses to make a payment on account in a case that later turns out to involve major recoverable damage, he may become liable for the loss which his refusal to make a payment on account may have caused the assured, e.g. by his vessel being sold by forced auction. In order to protect the insurer against such a risk, *sub-clause 2, first sentence* states that the duty to make payments on account shall only exist if the insurer does not have “reasonable doubts as to his liability”. It goes without saying that a payment on account does not decide anything with regard to the question of liability, but to avoid any misunderstanding, this has been stated explicitly in *sub-clause 2, second sentence*.

The insurer may deduct outstanding premiums from the payment on account and from the final claim, without this having to be stated explicitly.

Under Cl. 90, sub-clause 3, of the 1964 Plan, the insurer was entitled to claim interest at the rate in force for savings banks on payments on account. This has been changed to the same rate as the rate used for the insurance contract, cf. the reference to Cl. 5-4, *sub-clause 3, first sentence*. For payments on account of amounts recoverable in general average, it follows from the *second sentence* that the

rate of interest for the average adjustment shall apply as long as the general average interest accrues, cf. YAR 2016, rule XXI.

The insurer's interest claim under sub-clause 3 will normally be deducted from the final claim. However, if the interest exceeds the assured's outstanding claim, the insurer may claim a corresponding reimbursement.

In practice, it has turned out that owners have from time to time received excessive payments on account. In that event, the payment on account must be considered equivalent to a loan from the insurer, and interest shall be charged in the usual manner on the entire excess amount. The rate of interest should be the same on the payment on account and the claims amount.

The provision in sub-clause 3, *third sentence*, is new and establishes that in loss-of-hire insurance the insurer may demand interest on payments on account from the same time as the **contract** interest accrues, i.e. one month after expiry of the period for which he is liable. The reason for the rule is that the assured's loss under loss-of-hire insurance accrues as the period of repairs progresses, even if the insurer, formally speaking, starts to pay interest only as of one month after expiry of the period for which he is liable. In real terms, a payment made during the period of repairs is more in the nature of compensation rather than a payment on account.

#### **Clause 5–8. Payment on account when there is a dispute as to which insurer is liable for the loss**

This Clause is identical to Cl. 91 of the 1964 Plan.

According to the *first sentence*, the insurers shall make a proportionate payment on account of the compensation if there is a dispute as to which one of them is liable. A dispute as to which insurer is liable for a certain loss should not be to the detriment of the assured. Until it has been finally decided which of the insurers is liable for the loss, the assured may not demand any payment on account under Cl. 5-7, and special authority is therefore required in order for him to claim a payment on account from the insurers who may conceivably be liable. The wording to the effect that the insurers shall make a "proportionate payment on account" means that the disputed claims amount shall be divided equally among them. The duty to make payments on account applies only in the relationship between insurers who have in principle accepted liability, but who do not agree which one of them has to pay. If one of the insurers has any other objections to the claim, e.g. that the loss was caused by the assured by an act which is in breach of the insurance conditions, none of the insurers is obliged to make any payment on account, cf. *second sentence*.

Where the insurers' contingent liability for the loss does not represent the same amount, the payment on account shall be based on the lowest liability in order to avoid the assured having to repay the proportion of the payment on account which refers to a compensation he will not be awarded.

This provision may become applicable in a number of situations. It will apply to the relationship between the marine-risks and war-risks insurers if it is a question of an apportionment of the loss under Cl. 2-14 or Cl. 2-15. Further, the principle will be applicable if it is a question of referring the liability for damage back to a former insurer in accordance with Cl. 2-11, sub-clause 2. Also conceivable is a dispute as to which of several successive casualties has caused a certain loss where the casualties occurred during the insurance periods of different insurers.

Similar conflicts may also arise in the relationship between the hull insurer and the P&I insurer. If the provision is to apply in such conflicts, however, it is a prerequisite that the P&I conditions contain a reference to the Plan.

## Section 2

### Liability of the assured to third parties

#### **Clause 5–9. Duties of the assured when a claim for damages covered by the insurance is brought against him**

This Clause corresponds to Cl. 92 of the 1964 Plan.

The provision is closely bound up with Cl. 3-29 concerning the duty of the assured to notify the insurer of a casualty.

*Sub-clause 1* applies first and foremost where the assured is held liable for a loss which he has caused a third party, but it may also become applicable where a third party makes a claim for a salvage award or payment for repairs. Accordingly, the *first sentence* of the Clause uses the term “liability” and not “liability to pay damages”.

In the event of a dispute with third parties, the assured and the insurer will normally have common interests. However, there may be cases where a certain conflict exists, first of all in the event of fault on the part of the assured. Consequently, the insurer must have unconditional and immediate access to all documents and other evidence, cf. *third sentence*.

Under the 1964 Plan, the insurer also had the right to be represented by his own counsel. This provision has been deleted. Under Section 3-1 of the Norwegian Dispute Act (*Tvisteloven*), the court may allow the assured to be represented by more than one counsel if there are special reasons for

doing so. If the insurer wishes to be joined as a party to the action, the ordinary rules relating to joinder of causes of action and accessory intervention apply.

Under *sub-clause 2*, the insurer may only plead that the assured has been in breach of his duty if the assured has shown intentional or gross negligence, cf. also Cl. 3-31 as regards breach of the duty to avert and minimise loss.

### **Clause 5–10. Right of the insurer to take over the handling of the claim**

This Clause is identical to Cl. 93 of the 1964 Plan.

The *first sentence* states that the insurer may, subject to the consent of the assured, take over the handling of a claim brought against him. From the insurer's point of view, it will always be desirable to be able to take over the handling of the assured's disputes with third parties. In this area the insurer has the widest experience, and it will therefore normally also be in the assured's own best interest to give his consent. That the insurer takes over the case obviously does not imply acceptance on his part of any obligation to pay the amount for which the assured may be held liable; in order to avoid any misunderstanding, this is stated explicitly, cf. *second sentence*.

The insurer does not have an unconditional right to take over the handling of the claim, nor to bring an action in the name of the assured. Such a solution could be unreasonable vis-à-vis the assured in situations where he himself has interests in the dispute, which are of greater economic importance than the insurer's, for example, in connection with his own counterclaims concerning loss of time. It is also conceivable that both the hull insurer and the P&I insurer will want to take over the case when it is evident that they will each be covering their part of the assured's liability. In that event, the most reasonable procedure will be for the assured himself to conduct the case on behalf of both insurers.

### **Clause 5–11. Decisions concerning legal proceedings or appeals**

*Sub-clause 1* was amended in the 2013 Plan.

Difficult questions may arise where the assured and his liability insurer disagree as to how to handle a dispute with a third party, for instance, whether to accept an offer of an out-of-court settlement, or whether to accept or appeal against a court decision. Relevant questions are: who is authorized to make the decisions, the insurer's liability if the assured refuses to comply with his decision, and liability for litigation costs in connection with the various outcomes the dispute may have. The situation is made even more complex by the fact that there will often be two liability insurers behind the assured - the hull and the P&I insurer, respectively - and the fact that their interest in the outcome of the assured's dispute with a third party may differ. The following example shows how the conflict may arise: insured vessel A has collided with vessel B, which is lost with a valuable cargo and many

passengers. The cargo on board vessel A is also damaged. Disputes arising from the collision are to be tried under American law. By a judgment of a court of first instance, the fault has been attributed entirely to A, but the owner has been granted the right to limit his liability. The owner and the hull insurer want to appeal against the judgment with a view to obtaining an apportionment of fault, under which the owner would obtain partial cover of his loss of time, and the hull insurer would obtain a reduction of the collision liability and partial cover of the repair costs. The P&I insurer objects to an appeal for two reasons: partly because an apportionment of fault would impose an indirect liability on him for half of the damage to A's own cargo and partly because he fears that the superior courts would not only place the entire fault with vessel A, but would also find this to be a case of fault, which would deprive the owner of the right to limit liability. Unlimited liability for damages would first and foremost affect the P&I insurer, given that the hull insurer's liability for collision damages is limited to the sum insured, cf. Cl. 13-3.

Normally the parties will reach an agreement. In case of disagreement, the parties will as a rule consult internal expertise. However, if one of the parties brings the matter to a head, there must be rules to fall back on.

Under *sub-clause 1*, conflicts between the assured and the insurer about the filing of suits or appeals shall be decided with binding effect by an umpire designated by the Association of Nordic Average Adjusters. In earlier versions the appointment of the umpire was to be made jointly by the Norwegian average adjusters, but this is changed due to the Plan now being Nordic.

*Sub-clause 2* lays down certain principles the umpire shall adhere to in his decision. The basic rule is that he must choose the solution which, in his opinion, will in all probability result in the least overall loss for the assured and his insurers, cf. *first sentence*. A crucial point in this connection will be the risk of the assured being denied the right to limit his liability by the court of appeal. However, sub-clause 2, *second sentence*, also indicates a factor which the umpire shall not take into account. As evidenced by the example given above, the P&I insurer will sometimes prefer the fault for a collision to be placed solely with the assured, in view of the fact that he will thus avoid the so-called "indirect cargo liability". The assured will have a similar interest in relation to the hull insurer if he has not taken out P&I insurance. However, attempting to have the degree of fault of the insured vessel reduced through a hearing of the case by a higher court must at all events be a legitimate interest worth protecting. A rule has accordingly been incorporated to the effect that the umpire shall not take into account the advantage which the assured or his P&I insurer may have through an acceptance of, or an attempt to be allocated, a higher degree of fault than necessary in a collision case.

The umpire shall decide the conflict of interest between the assured and his insurers with final effect, but there are no enforcement measures vis-à-vis the assured if he does not comply with the umpire's directions. The assured's failure to do so will affect both the liability of an insurer in whose favour the

umpire's decision was made, and the payment of the litigation costs, cf. *sub-clause 3*. If the insurer wants to accept an offer of an out-of-court settlement or a court decision and is supported on this point by the umpire, he shall cover the liability which would have been imposed on the assured by the out-of-court settlement or a court decision, cf. *first sentence*. If the insurer wishes to lodge an appeal and is supported by the umpire, he will cover the liability he anticipated would be imposed on the assured by a superior court and which he has accordingly offered to cover. It is therefore important that, during the umpire's consideration of the matter, the insurer makes it clear to him exactly what he wants to achieve by lodging an appeal. As mentioned in Cl. 4-21, the insurer does not in such situations have the right to pay out the sum insured for the liability and refuse any further involvement in the case.

Should it turn out that the umpire was wrong, and the assured's choice was justified so that the insurer in actual fact incurs less extensive liability than that which he had declared himself prepared to accept, it is reasonable that he shall also pay his proportionate share of the litigation costs. This is explicitly stated in the *second sentence*.

## **Clause 5–12. Provision of security**

This Clause is identical to Cl. 95 of the 1964 Plan.

Under *sub-clause 1*, the insurer has no legal obligation to provide security. Such an obligation could result in liability for him vis-à-vis the assured in cases where the security is provided too late, or where no security is provided at all due to unforeseen difficulties. However, in practice the claims leader will, to a large extent and at the assured's request, provide security for liability covered by the insurance, and this practice will obviously continue. If the insurer refuses to provide security, and the assured is able to document that this refusal constitutes arbitrary discrimination, he may claim compensation from the insurer.

*Sub-clause 2* states explicitly that the provision of security does not imply an acceptance of liability.

The costs involved in the provision of security constitute an expense that follows from the fact that liability has been invoked against the assured. If the insurer covers the liability, he must also cover these costs. However, if it turns out that the liability does not concern him, he will be able to claim a refund of his expenses from the assured, cf. *sub-clause 3*.

The questions which arise in the relationship between the claims leader and the co-insurers in connection with the provision of security are discussed in Cl. 9-7.

## Section 3

### Claims by the assured for damages against third parties

#### **Clause 5–13. Right of subrogation of the insurer to claims by the assured for damages against third parties**

The Commentary was amended in 2016.

*Sub-clause 1* establishes the insurer's right to be subrogated to the assured's claims against third parties. When the assured has a claim for damages against a third party on account of a loss, either wholly or in part, e.g., as a general average contribution or as compensation for collision damage, the insurer will automatically be subrogated to the assured's claim against the third party when he pays compensation under the insurance contract.

The insurer is subrogated to "the rights of the assured against the third party concerned". This entails that he takes over the claim for damages regardless of the basis on which it is founded. However, this does not apply where the assured has a claim by virtue of another insurance contract. Here the special rules relating to double insurance contained in Cl. 2-6 and Cl. 2-7 shall apply. If one of the insurers is liable by virtue of the rules relating to costs of measures to avert or minimise loss, however, the entire loss shall be covered by that insurer, cf. Cl. 2-7, sub-clause 3.

The insurer is subrogated to the claim as it is in the assured's hands. If there is a maritime lien or some other security connected with the claim, the insurer may exercise this right, cf. ND 1939.269 NH CONGO.

The insurer only takes over claims for damages that are connected with the interest insured and refer to the very losses that the insurer has covered. If the assured has suffered any other loss that is not covered under the insurance (e.g., loss of time in connection with a collision), he retains the claim for damages or the claim for contribution in respect of these items.

For H&M insurance, situations have arisen where e.g. an engine maker or a shipyard have accepted liability (wholly or partly) for damage done to the ship, a guarantee claim or the like. In such situations it may not be readily apparent whether there is a recovery to be dealt with under this Clause, or whether there is e.g. a "discount" or the like to be deducted from the claim.

In this respect, it should be noted that there can not be any recovery to be dealt with under Cl. 5-13 unless there is a liability for insurers to pay compensation in the first place. As an example, in case an engine maker accepts liability for damage to an engine and repairs the engine free of charge, there is no liability on H&M insurers to pay compensation under Cl. 12-1 for the work by engine makers, as

nothing is payable to them (see particularly Cl. 12-1, sub-clause 2). The value of repairs by engine maker therefore represents unbilled repairs, which would be equivalent to a discount to be deducted from the claim, and Cl. 5-13 is not applicable. The assured may however have to pay associated costs such as shipyard expenses for repair support, classification of repairs and other costs, which would be claimable under the H&M insurance contract pursuant to Chapter 12 of the Plan. In case engine makers accept liability and reimburse such costs, the reimbursement will represent a recovery to be dealt with under Cl. 5-13. Therefore, as a general guideline the value of unbilled and/or unpaid repairs do not give rise to application of Cl. 5-13, whilst reimbursement of recoverable repair costs previously paid (incl. costs which are obviously payable although not yet paid) by the assured constitutes a recovery to be dealt with under Cl. 5-13.

The rule in sub-clause 1, second sentence, is referred to in connection with Cl. 4-14.

*Sub-clause 2* regulates the situation where the insurer is only partly liable for the loss. In marine insurance the situation will often be that the insurance conditions provide that the assured shall bear part of the loss in the form of deductions or deductibles. In that event, the assured shall retain a proportion of the claim for damages against the third party concerned equivalent to the loss he has sustained himself, cf. *first sentence*.

A simple example:

A shipowner has agreed the deductible for PA damage per Cl. 12-18 to be USD 100,000. His ship (ship A) is damaged in a collision. Cost of repairs is USD 400,000, and insurers therefore pay compensation for damage to ship A in the amount of USD 300,000 net of deductible. Thereafter the opponent vessel (ship B) is held liable and are eventually found 60% to blame. Recovery is consequently USD 240,000. Pursuant to Cl. 5-13, sub-clause 2, the recovery shall be apportioned as follows:

Insurers recover  $300,000/400,000$ ths of USD 240,000 = USD 180,000

And owners of ship A recover  $100,000/400,000$ ths of USD 240,000 = USD 60,000

This is relatively straightforward when the deductible is agreed with a fixed amount for PA damage, pursuant to the standard Cl. 12-18 solution. And even if the insured vessel has incurred liability during the same event (e.g. 40% in the above example), the standard Plan solution is that the parties should agree a separate deductible to be applied for any collision liability, see Cl. 13-4.

In practice it is sometimes agreed in the policy that in case there are PA damage to the ship as well as liability under the Plan's Chapter 13 during the same event (e.g. in a both to blame collision), the maximum total amount to be deducted shall be equivalent to the higher of the 2 deductibles agreed (Cl. 12-18 and Cl. 13-4). However, for recovery purposes it is necessary to identify the amount of deductible attaching to each of the two categories of claim (i.e. PA damage to own ship and liability to

other ship). The general principle for a H&M claim is that a deductible is proportioned over all claim items / disbursements to which the deductible is applicable. (This will also follow from interest calculation guidelines found in the Commentary to Cl. 5-4.) As a starting point, the same principle must apply in case a deductible attaches to PA damage as well as to liability. If we expand on the example above we can assume that in the policy for ship A the agreed PA deductible (Cl. 12-18) is USD 100,000, and the liability deductible (Cl. 13-4) is USD 50,000. With damage to the ship and liability during the same event, the maximum total deductible for damage and liability should be equivalent to the higher of the two (i.e. USD 100,000). The following examples may serve as a guideline:

1. Ship A suffers PA damage USD 400,000 (recoverable under Chapter 12) and ship B suffers damage in the amount of USD 250,000. Ship A was 40% to blame and had to pay liability 40% of B's loss = USD 100,000. Total claim subject to deductible for ship A would then be (ship damage 400,000 + liability 100,000) USD 500,000 and the deductible shall then be apportioned with  $400,000/500,000$ ths of deductible 100,000 = USD 80,000 attaching to PA damage, and  $100,000/500,000$ ths of deductible 100,000 = USD 20,000 attaching to liability. In other words, the deductible is apportioned pro rata in accordance with general principles. The consequence for apportionment of recovery from opponent vessel would be that the assured has carried USD 80,000 of vessels own damage, and therefore receives  $80,000/400,000$ ths of recovery from ship B. If total recovery is (60% of 400,000) USD 240,000, then the assured receives (60% of 80,000) USD 48,000, and the balance (60% of 320,000) USD 192,000 is credited the insurer.
2. Ship A suffers PA damage USD 400,000 (as the example above), but now ship B suffers damage in the amount of USD 1.5 million, whereof vessel A is liable for 40% or USD 600,000. Total claim subject to deductible for ship A would then be (ship damage 400,000 + liability 600,000) USD 1,000,000 and if deductible is proportioned, the share attaching to liability would be USD 60,000. However, as the deductible applicable for liability is stated to be USD 50,000 in the policy, this is the maximum amount applicable to the liability claim, and therefore USD 50,000 would be applicable to liability, and the balance of the total deductible USD 50,000 would be applicable to damage to own ship. The consequence for apportionment of recovery from opponent vessel would be that the assured has carried USD 50,000 of vessels own damage, and therefore receives  $50,000/400,000$ ths of recovery from ship B. If total recovery is (60% of 400,000) USD 240,000, then the assured receives (60% of 50,000) USD 30,000, and the balance (60% of 350,000) USD 210,000 is credited the insurer.

It should also be noted that the above principles for apportionment of deductible is applicable irrespective of whether the PA claim or liability claim is settled first. For collision cases, usually the PA claim is adjusted and settled before the collision claim, and then in practice the full deductible will be deducted on the PA adjustment. Still, the deductible must be reapportioned in the collision adjustment, primarily in order to obtain a correct basis for apportionment of recovery.

The claim for damages shall also be divided when the value of the interest affected by the loss is estimated to be a higher amount in the relationship between the assured and the third party than in the relationship between the assured and the insurer, and the third party is only liable for a portion of the loss, or is unable to cover the full value of the interest, cf. *second sentence*. Hence, the claim for damages shall be divided proportionately if the ship becomes a total loss as the result of a collision and its value is estimated to be higher than the hull valuation, whilst the third party, due to the rules relating to limitation of liability, pays a smaller amount in damages than what the insurer has paid to the assured. Conversely, if the value of the ship in a collision case is estimated to be an amount equivalent to or lower than the hull valuation, the insurer shall keep the entire claim for damages, unless the assured has also suffered other losses.

It is the assured's claim against third parties which may be subjected to a proportionate division, and not the amount of damages which may be paid. The insurer shall invoke his portion of the claim in his own name. If the assured does not wish to pursue his part of the claim, he is free to drop it. If both the insurer and the assured invoke their claims, it would be natural to try these claims in the same action; such action shall then be conducted in the names of both parties.

Where it is the assured's claim that is divided, it is superfluous to issue rules relating to the apportionment of the costs of recovery. Each of the parties shall bear the costs that have been necessary in order to recover his own claim.

If the claims brought by the assured and the insurer against the third party concerned are not met in full, for example because the third party only has limited liability or is insolvent, the assured competes on a par with the insurer. The Plan has not adopted the rule that is common in types of insurance of a more social nature to the effect that the assured's claim for damages prevails over that of the insurer in the event of the relevant third party's bankruptcy.

If the value of the interest insured is set at a higher amount in the relationship between the assured and the third party than in the relationship between the assured and the insurer, and the third party is furthermore liable for the full loss and is able to pay the entire amount, the insurer's portion of the claim will be larger than the compensation he has paid to the assured. It would not be reasonable for the insurer to make a profit from his right of subrogation in this way, and *sub-clause 3* therefore establishes that such profit shall be transferred back to the assured. There will obviously be no

question of any profit until the insurer has been reimbursed the expenses covered in connection with the recovery of the claim and the interest accrued on the compensation he has paid to the assured. The loss of interest for the period following the claims settlement with the assured must also be taken into account.

If the third party's liability is stipulated in another currency than the one set out in the insurance contract, the insurer shall bear the risk of any exchange loss during the period between the event involving liability and the enforcement of the recourse claim. On the other hand, the insurer shall also have the advantage of any exchange gain. Hence, the rule in sub-clause 3 shall not apply here.

A special question arises where several insurers are entitled to a portion of the claim for damages. The problem poses no difficulties if the various insured interests are assessed separately in the claims settlement. However, if the ship is a total loss as a result of a collision, the compensation will be fixed at one specific amount, representing the value of the ship, including the value of a lost charterparty, if relevant. In practice, it has been disputed how the compensation received shall be apportioned among the hull insurer, the hull-interest insurer and the freight-interest insurer. One solution is to make a proportional apportionment also among the total-loss insurers. In the alternative, the traditional layer distribution of the total-loss insurances may be adopted, and the hull insurer must be given first priority to compensation to the extent of his claim. The hull-interest insurer will then be given second priority, whilst the freight-interest insurer will only get his share if there is still anything left of the compensation. The reason for this solution is that it would not be reasonable if, in the event of a total loss, the hull insurer's claim for damages were to be affected by the extent of the freight-interest insurance that the shipowner has taken out.

During the revision, there was general consensus that in the normal situation where the hull value is equal to or higher than the market value, the hull insurer should be given priority. In the event of a total loss with a subsequent refund from the party causing a loss of NOK 3 million and a hull valuation of NOK 18 million, the hull insurer should receive the entire compensation if the market value is lower than NOK 18 million. In these cases, the hull interest and the freight-interest insurers will not get anything. If, however, the hull valuation is lower than the market value, an apportionment must be made so that each insurer receives a portion of the compensation that is proportionate to his share of the market value. The excess amount accrues to the assured. If the market value in the example above is NOK 25 million and the hull interest is insured at NOK 4.5 million, the hull insurer will thus receive  $18/25$  of NOK 3 million, the hull-interest insurer  $4.5/25$  of NOK 3 million, and the owner  $2.5/25$  of NOK 3 million.

The insurer's right of subrogation to claims by the assured for damages against third parties is also regulated in Cl. 5-22. The relationship between these provisions appears from the Commentary on that provision.

## **Clause 5–14. Waiver of claim for damages**

This Clause is identical to Cl. 97 of the 1964 Plan.

The Clause regulates the effect of the assured's waiver of his right to claim damages from a third party. It is primarily applicable in connection with damages in a contractual relationship where the assured has waived in advance his right to claim damages from the other party to the contract.

As mentioned in Cl. 4-15, the question of whether the waiver can be considered customary in the trade in question must be evaluated on a case-to-case basis. An advance waiver of the right to claim damages may, for example, occur in contracts concerning pilotage or towage. In some cases, the ship may be able to obtain a contract where the other contracting party undertakes greater liability for any faults that may be committed, in return for higher remuneration. It is difficult to make any general statements about the assured's right to choose the less expensive alternative. Whether it would have been reasonable to demand that he, by incurring a somewhat higher expense, obtain a contract which would have been more satisfactory from the insurer's point of view must be decided on a case-to-case basis.

Sometimes clauses are used where the party to a contractual relationship who is likely to sustain damage waives any and all claims for damages to the extent his loss is covered by an indemnity insurance. When such a "benefit-of-insurance" clause becomes applicable between the parties, no claim for damages arises which the insurer can take advantage of. The clause will accordingly have to be evaluated under this Clause.

If the waiver is not made until after the claim for damages has arisen, the situation will be covered both by the present clause and by Clause 5-16. The assured will obviously always have the right to waive the portion of the claim that accrues to him. If he waives the insurer's portion, the deciding factor must be whether the insurer would have had to accept the waiver if it had been made before the claim arose, cf. *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 600.

The provision does not cover the situation where the assured has waived the entire claim for damages after the insurer has exercised his right of subrogation. In that event, the assured is not entitled to waive the claim.

## **Clause 5–15. Duty of the assured to assist the insurer with information and documents**

This Clause corresponds to Cl. 98 of the 1964 Plan.

As regards the interpretation of sub-clause 1, reference is made to what is stated in Cl. 5-1, sub-clause 1.

Cl. 98, sub-clause 2, second sentence, of the 1964 Plan, contained a provision to the effect that, in the event of litigation between the assured and a third party, the insurer would be entitled to be represented separately. This provision has been deleted. This is a question that should be solved in accordance with the law of procedure in the country where the case is being tried by the courts, cf. in this respect the Commentary on Cl. 5-9.

## **Clause 5–16. Duty of the assured to maintain and safeguard the claim**

**The Commentary was amended in the 2019 Version.**

Under *sub-clause 1*, the assured shall secure a claim against third parties on behalf of the insurer. The provision is particularly relevant where the owner has the right to claim general average contributions from the cargo. The owner has the right to refuse to surrender the cargo unless the consignee assumes personal liability for the contribution (signs an “average bond”) and, possibly, provides security. This provision implies that it is the owner’s duty to obtain a general average bond before the cargo is surrendered.

If the assured, intentionally or through gross negligence, breaches sub-clause 1, the assured is liable for the loss thereby incurred by the insurer, cf. *sub-clause 2*. If the assured realized that it was a case of general average, surrendering the cargo without taking care of the necessary formalities with a view to securing the right of recourse will normally constitute gross negligence. In that event, the owner cannot lodge a claim for the entire general average damage against the hull insurer, cf. the comments on Cl. 4-8. If the fault was committed by the master of the ship, the question arises as to whether the assured is to be identified with the master, cf. Cl. 3-36. Normally, it will be a question of the delegation of the decision-making authority that provides the basis for identification. If the hull insurer is to cover the entire general average by agreement, normally in the form of a **general average absorption Clause**, cf. Cl. 4-8, sub-clause 3, this problem will admittedly not arise **as long as the claim for general average falls within the general average absorption amount agreed in the policy**. In that event, the owner will be entitled to claim compensation for the entire damage from the hull insurer, even though it would not have been covered in general average. **On the other hand, if the general average claim exceeds the general average absorption clause and no steps are taken by the assured to secure right of recourse, the assured will usually be liable for any loss incurred by the insurer due to such failure. An exception from this is where the assured can show that he reasonably expected the general average to remain below the general average absorption amount or that there would be no or limited prospects of recovering contribution from cargo in any event e.g. due to an obvious breach of contract.**

**Clause 5-17. Decisions concerning legal proceedings or appeals**

This Clause is identical to Cl. 100 of the 1964 Plan.

When the assured has a claim for damages against a third party, the latter will very often have a counterclaim against the assured. Such counterclaims must often be covered by the P&I insurer, whereas the claims for damages will usually accrue to the hull insurer. Accordingly, in such situations, there is the same need for an impartial decision on the litigation issue as when a third party brings a claim for damages against the assured.

The provision does not apply when the disagreement between the assured and the insurer merely consists of differing assessments of the chances of getting the claim for damages upheld, taking into account the costs involved in enforcing it. As mentioned in Cl. 5-13, the assured and the insurer will, in such a situation, have the right to pursue or waive their share of the claim, at their own discretion.

**Clause 5-18. Salvage award which entails compensation for loss covered by the insurer**

This Clause is identical to Cl. 101 of the 1964 Plan.

Under Section 446 (f) of the Norwegian Maritime Code, the material loss sustained by the salvor in connection with the salvage operation shall be taken into account when the salvage award is determined. Under Section 451, first sub-clause, of the same Code, any damage to the ship or cargo caused by the salvage operation shall be paid for out of the salvage award before anything is distributed among owner and crew. The payment of a salvage award does not entail that the insurer's liability ceases, but that the salvage award shall be considered in the same way as an ordinary claim for damages. However, it would not be correct to say that the insurer "is subrogated" to the salvage award claim, cf. Cl. 5-13. The claim for a salvage award is not a "claim for damages"; the assured does not have an unconditional right to receive a salvage award covering the damage the ship has sustained in connection with the salvage operation. It must therefore be stated explicitly that the assured shall refund the insurer whatever the latter has paid in settlement of the assured's loss, cf. *sub-clause 1*. The assured's obligation to reimburse the insurer will, first of all, comprise the portion of the salvage award with which he is credited in advance in a settlement under Section 451, first sub-clause, of the Norwegian Maritime Code, to cover damage to the ship. If this part of the salvage award is not sufficient, for instance, because damage to the ship was underestimated during the salvage award case, the assured shall also be obliged to reimburse the insurer out of the remainder of the salvage award which he has received.

The reference to Cl. 5-13 *et seq.* entails that the assured's share of the salvage award shall be divided between him and the insurer according to the same rules as those applicable to ordinary claims for

damages. The assured is therefore entitled to retain a portion equivalent to deductions and deductibles that he himself has borne. Furthermore, the assured shall, in relation to the insurer, be obliged not to waive the right to claim a salvage award to any exceptional extent, nor to neglect to pursue any claim to recover a salvage award which has arisen.

## Section 4

### Right of the insurer to take over the object insured upon payment of a claim

#### **Clause 5–19. Right of the insurer to take over the object insured**

This Clause corresponds to Clauses 102 and 103 of the 1964 Plan.

*Sub-clause 1* is a merger of sub-clauses 1, first sentences, of clauses 102 and 103 of the 1964 Plan, and confirms the principle that, upon payment of compensation, the insurer is subrogated to the assured's rights in the object insured or such parts thereof as he has indemnified. The rule applies to damage as well as to total loss, and entails that the insurer takes over all the objects which are comprised by the sum insured or the compensation which is paid, cf. *first sentence*.

In the case of damage, the greatest practical significance of the principle is in hull insurance, where repair work will often result in a quantity of scrap iron becoming available, in addition to damaged parts of a certain value. However, in a number of cases such parts will be left with the repair yard, either in return for the assured being credited for the value of the material in the repair settlement, or because a clause is incorporated in the repair contract to the effect that everything that is scrapped during the repairs will accrue to the repair yard without compensation, cf. *Brækhus/ Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 604. This will normally reduce the repair invoice for the insurer, and this means that there shall be no transfer to him under Cl. 5-19. However, the rule becomes applicable if the remaining parts do not accrue to the repair yard, but are sold to a third party. In that event, the proceeds must accrue to the insurer, or possibly be divided between the insurer and the assured under Cl. 5-13, cf. below.

In the event of a total loss, the insurer is subrogated to the title to the wreck. The title comprises the wreck with all appurtenances that were covered under the insurance at the time the total loss occurred.

The insurer is entitled to waive ownership if he has explicitly made a statement to that effect no later than upon payment of the compensation. The insurer is therefore able to protect himself against the burdens that may be associated with owning what is left of the object insured or parts thereof and disposing of same. Under the 1964 Plan, this rule applied only to total losses; now it also covers the damage situation. This right will, however, be particularly relevant in the event of a total loss, where

wreck-removal and pollution liability may be imposed on the owner of the wreck. In hull insurance, where the question is most relevant, the risk is admittedly limited by Cl. 5-20, sub-clause 1, which states that the insurer shall not bear the costs of removal that are not covered by the sale of the wreck. However, the position as owner of the wreck may expose the insurer to the risk of incurring liability for damages to third parties.

In practice, there have been cases where the insurer has wanted to take advantage of the value of the wreck without taking over the title to the wreck, *inter alia* for fear of potential pollution liability, cf. below. The Plan does not open the door to such a solution. If the insurer wants to take advantage of the value of the wreck, he will also have to take over ownership. There is, however, nothing to prevent the insurer and the assured from agreeing to the assured selling the wreck to a third party and having the proceeds deducted from the total loss compensation, or paid to the insurer if the total loss compensation has already been paid to the assured. However, the insurer does not have any right to demand this procedure if the assured refuses to co-operate.

If the insurer takes over the ship, a change of ownership will in principle take place, with the consequence that the ship's insurances will cease, cf. Cl. 3-21. If the ship subsequently causes pollution liability, this will accordingly be the insurer's own risk, cf. below in Cl. 5-20, unless the risk of a pollution liability had already struck the ship at the time when the title to the ship passed to the insurer.

In practice, it is conceivable that the wreck is sacrificed (is sunk or bombed) in order to avoid pollution liability. If the wreck had a certain value when it was sacrificed, it may be alleged that the hull insurer's interest in the wreck value of the ship was sacrificed in order to safeguard the interests of the assured and the P&I insurer in avoiding pollution liability. In that event the assured, and subsequently the P&I insurer, should be liable for the wreck value in relation to the hull insurer. If the hull insurer has taken over the wreck after having paid total-loss compensation, or having clearly indicated before the ship was sacrificed that he is willing to take over the wreck, he must accordingly have a claim against the assured. However, the hull insurer will normally hesitate to do this because of the risk of having to cover pollution liability. Thus, if the hull insurer has adopted a wait-and-see approach before the wreck is sacrificed, he is only entitled to claim a refund for the wreck value from the assured or the latter's P&I insurer, if he establishes that he would have taken over the wreck.

The insurer is only subrogated to the right to the whole or parts of the object insured to the extent that he has covered the loss. In case of a total loss, the sum insured becomes payable without any deductions or deductibles. The insurer then takes over the full title to the wreck, unless there is under-insurance, cf. the reference to Cl. 2-4. Such a situation will rarely arise in hull insurance for ocean-going vessels when using agreed insurance contracts, but in exceptional cases it is reasonable that the assured is entitled to his proportionate share of what is left. Under the 1964 Plan, the reference

to Cl. 9 concerned only total losses - after the merger of the two provisions, it also comprises cases of damage.

In the event of damage, however, the assured will often have to bear a portion of the loss himself in the form of deductions and deductibles, in which case he will have to retain a corresponding portion of the value of the parts or objects which have been replaced or compensated. The apportionment must be effected in the same way as when the assured has a claim for damages against a third party in connection with the damage, cf. the reference to Cl. 5-13 in *sub-clause 3*.

## **Clause 5–20. Charges on the object insured**

This Clause corresponds to Cl. 104 of the 1964 Plan.

*Sub-clause 1* regulates the position where the insurer is ordered to remove objects (wreck, equipment) which he has taken over. In the 1964 Plan, the rule applied only to the insurer's take-over of the wreck; now it also applies to damage, e.g., where the insurer has taken over ownership of a lost anchor or other parts according to Cl. 5-19 and has later been ordered to remove them.

Under Section 18, third sub-clause, cf. Section 20, of the Norwegian Act of 8 June 1984 No. 51 relating to port authorities (*Havne- og farvannsloven*), the port authorities may remove a wreck which constitutes an inconvenience to the port or impedes general traffic. The costs of removal may be covered by the wreck and, if this is not sufficient, by the owner who will, however, normally have only limited liability. Similar rules apply in most countries.

The hull insurer does not cover the assured's liability in these cases, cf. Cl. 4-13. However, liability for the removal of the wreck may arise after the insurer has taken over title thereto under Cl. 5-19. Given that the hull insurer is entitled under the Plan to waive title to the wreck, one might think that he should also be fully liable for the costs of removal in the cases where he has decided to take over the wreck. However, there is a long-standing tradition in marine insurance law that the assured (in reality his P&I insurer) shall refund the insurer the portion of the costs which exceeds the value of the removed wreck. In practice, an order to refund the costs of removal will only be issued where the wreck is worthless and the responsibility for the removal could appear to be a trap for the hull insurer if he has failed to waive title to the wreck.

If the wreck founders after the insurer has taken it over, but as a consequence of the same casualty which resulted in the payment of the total-loss claim, the assured (his P&I insurer) shall pay the removal costs, if any. The liability must here be regarded as having arisen as a consequence of a casualty that occurred while the insurance was in effect. If, however, the wreck founders in consequence of a new casualty which occurs after it was taken over by the hull insurer, the assured

(his P&I insurer) will not be liable for the removal costs under sub-clause 1. A hull insurer who takes over a wreck that is afloat should therefore consider taking out separate P&I insurance for the wreck-removal risk. As regards what constitutes a “new casualty”, reference is made to the comments in Cl. 4-18.

If the wreck suffers a new casualty after the insurer has taken it over, and the impaired condition of the ship after the first casualty is a contributory cause, the wreck-removal liability should nevertheless lie entirely with the hull insurer, cf. also *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 605.

Under certain P&I insurance conditions, the insurance coverage ceases in the event of a casualty. In practice, such provisions have been applied as an authority for the P&I insurer to withdraw from the insurance contract before the details of the casualty have been finally clarified. The question then arises whether the hull insurers by taking over the wreck risk also taking over increased liability for the removal of the wreck, possibly also a pollution liability, as owners of the wreck. If the Plan has been used as background law for the P&I insurance, such a clause cannot exempt the P&I insurer from liability. A deciding factor must be when “the peril struck”, not when liability arose and, as regards wreck-removal liability and pollution liability resulting from a total loss, the peril will have struck when the casualty occurred. Consequently, the fact that the insurance ceases before the wreck has to be removed or the actual pollution occurs is irrelevant to the P&I insurer’s liability.

If the P&I insurance is effected on conditions with a background law other than the Plan, other solutions may well be reached as regards the P&I insurer’s liability. However, it is difficult to see how the liability of the hull insurer as owner of the wreck can be increased even if the P&I insurer withdraws. If liability for the wreck-removal and potential pollution is a foreseeable consequence of the casualty that triggered the total loss, this must basically be the liability of the assured as the person causing the damage. The fact that the P&I insurer refuses to cover this liability means that the assured is left without insurance cover, but it cannot imply that liability is transferred to the new owner, *viz.* the hull insurer. Another matter is that it may be difficult to decide what are foreseeable consequences of the total loss and what constitutes a new casualty. The solution to this question must follow the general principles for the distinction between one and several casualties, cf. above.

Charges that do not concern the insurance, e.g. maritime liens for claims not covered by the insurance, do not concern the insurer, cf. *sub-clause 2*. The assured must cover such charges, regardless of whether or not he is personally liable for the claim.

The provision concerns only charges that have arisen before the title to the object insured passed to the insurer. If the wreck, after having become the property of the insurer, causes damage for which the

owner becomes liable, it is the insurer, and not the assured, who must cover this liability. Nor will the insurer be entitled to claim cover under the assured's P&I insurance.

Under the laws of some countries, the owner of the wreck has the right to abandon it to cover his liability for damages to a third party. If the owner is held liable after the title to the wreck has passed to the hull insurer, the owner must nevertheless be able to exercise his right to limit liability in the event of abandonment. A rule to this effect is explicitly stated in *sub-clause 3*. The rule of abandonment entails that the hull insurer loses the proceeds from the wreck, but it must apply even if the hull insurer does not cover the liability which attempts are made to limit, cf. *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 602.

The provision presupposes that the ship is "abandoned". If the ship is sunk as a measure to avoid pollution liability, this does not constitute "abandoning the ship". Such loss shall therefore be charged to the P&I insurer as costs of measures taken to avoid pollution liability.

#### **Clause 5-21. Preservation of the object insured**

This Clause is identical to Cl. 105 of the 1964 Plan.

Under Cl. 3-30, it is the assured's duty to take measures to avert or minimise loss, and under Cl. 4-12 the insurer shall cover the costs involved in such measures. However, it may be doubtful whether these rules are applicable if it has already been established that a total loss has occurred, e.g., that the ship will be condemned. The sub-clause therefore establishes that it is the assured's duty to preserve the wreck for the insurer's account until the insurer gets the opportunity to safeguard his own interests, irrespective of whether or not the total-loss claim has been paid. This also applies if it takes time to decide the total-loss question, and considerable costs are incurred in keeping watch, paying port fees, etc. If, however, the insurer has accepted liability for the total loss vis-à-vis the assured, but stated that he is not willing to incur costs involved in preserving the object insured, the assured must respect this decision. Any expenses incurred will, in that event, be his risk.

If the assured fails to perform his duties, he may, depending on the circumstances, incur liability for damages to the insurer.

If the insurer refuses to take over the wreck, he will not be liable for costs involved in measures that are subsequently taken.

#### **Clause 5-22. Right of subrogation of the insurer in respect of damage to the object insured**

This Clause is identical to Cl. 106 of the 1964 Plan.

When the insurer takes over the object insured, the question arises as to what will happen to the claims for damages the assured has against third parties in connection with damage to the object insured. If a claim has arisen from the casualty that has resulted in a total loss, the matter is clear. The insurer will be subrogated to the claim under the general rules contained in Chapter 5, Section 3, of the Plan.

However, it is conceivable that the ship has some older damage for which a third party is wholly or partly liable, or that new damage occurs after the occurrence of the casualty entitling the assured to a total-loss compensation, but before the compensation has been paid. In those cases, it may be doubtful whether the insurer can also be considered to have compensated the damage when he pays the total-loss claim, so that the rules in Chapter 5, Section 3, may become applicable. To avoid any misunderstanding, it is therefore stated explicitly in the *first sentence* that the insurer shall also take over such claims.

However, the insurer cannot make any deductions in the total-loss claim if the assured has already received compensation in advance from a third party. The financial results may therefore vary, depending on whether or not the assured at the time of the loss has received compensation from a third party. Nevertheless, no reason has been found to introduce a rule that leads to a different result. It is not very realistic to think that a hull insurer, when paying a total-loss claim, will demand information from the assured, e.g., about what compensation he has received in recent years from his time-charterers in connection with unrepaired stevedore damage etc.

Another question is whether third-party liability for the damage shall cease to be in effect because the person suffering the damage (the assured) is also entitled to total-loss compensation under his insurance. This is a question that comes under the law of torts, cf. ND 1942.449 Bergen BJØNN, where a claim for damages was not considered to have lapsed because of the subsequent total loss.

The *second sentence* establishes that the insurer does not have any right of subrogation to the assured's claim against third parties under insurance contracts. As regards insurance claims relating to older damage, the provision is bound up with the rule in Cl. 11-1, sub-clause 2, to the effect that the hull insurer cannot make any deductions for unrepaired damage when he pays compensation for a total loss, and with the fact that, according to standard practice, he furthermore does not have recourse against the insurer who may be liable for the damage, cf. the Commentary on Cl. 11-1. As regards casualties which occur after the casualty entitling the assured to total-loss compensation, the result also follows from Cl. 11-9, sub-clause 1, according to which the insurers who are not liable for the total loss are not liable for new casualties occurring after the casualty that resulted in a total loss, either. Thus, if the ship has suffered an extensive casualty as a consequence of marine perils, and the insurer against marine risks wants a war-risk cover of the value which the wreck will represent to him in case of condemnation, he will have to take out a separate war-risk insurance from the moment the assured requests condemnation.

## Section 5 Limitation etc.

### General

Section 5 concerns questions relating to limitation. It follows from Section 28 of the Norwegian Limitations Act of 18 May 1979 No. 18 (*Foreldelsesloven*) that the parties may not, before the claim has arisen, agree on longer limitation periods than the law provides. The provision covers agreements on the commencement of the limitation period as well as the duration and interruptions of the period. The regulation of these questions in the new Plan must therefore not result in longer limitation periods in relation to the insurer than that what would follow from Section 3, subsection 1 of the Limitations Act, which provides that a claim becomes statute-barred three years from the earliest date when the claimant is entitled to satisfaction of his claim. However, Section 30 of the Limitations Act opens the door for special regulation in special legislation, and such special regulation is contained in ICA Section 8-6. The Norwegian Insurance Contracts Act (ICA) Section 8-6 is not a mandatory provision in marine insurance for ocean-going vessels. However, if the regulation in the Norwegian ICA on this point is departed from, the mandatory protection of the insurer in the Limitations Act will nevertheless become applicable.

In the Plan it was decided to adopt the rules of the Norwegian ICA as a basis in this area. This entails a number of amendments and simplifications in relation to the rules of the 1964 Plan. Cl. 107 of the 1964 Plan relating to time-limit for notification of casualty has been retained, but amended. Cl. 108 of the 1964 Plan contained a rule relating to time-limits for taking legal action where the insurer had refused the claim. In that event, the claim became time-barred if the assured had not taken legal action or demanded that the dispute be submitted to an average adjuster under Cl. 87 within one year of receiving the insurer's notification of the refusal. If the dispute was submitted to an average adjuster, and his opinion was not in favour of the assured, the claim became time-barred, unless the assured had taken legal action within six months of receiving notification of the average adjuster's decision. At the same time Cl. 110 of the Plan indicated that the limitation period would not commence while the dispute was pending before the average adjuster. This solution may have been in violation of the Limitations Act with the result that the assured ran the risk of the claim becoming time-barred under the Limitations Act before the time-limit under Cl. 108 had expired, if more than two years had elapsed between the casualty and the insurer's refusal. This could come as quite a surprise for the owner, and the rule has therefore been deleted.

Cl. 109 of the 1964 Plan contained a provision relating to an extension of the time-limit on account of hindrance on the part of the assured. This problem is currently regulated in Section 10, subsections 2 and 3, of the Limitations Act. Through a reference to the Limitations Act in Cl. 107, sub-clause 3, the former Cl. 109 has therefore become superfluous. This provision has therefore also been deleted.

The real limitation rules were contained in Cl. 110 (three years' limitation) and Cl. 111 (ten years' limitation ) of the 1964 Plan. These provisions have now been combined into a single limitation rule.

### **Clause 5–23. Time-limit for notification of a casualty**

This Clause was amended in the 2013 Plan to adapt the Plan to its future application in Denmark, Finland and Sweden. **Further amendments were made in the 2019 Version.** The provision does not contain any actual limitation rule, but a passivity rule which supplements Cl. 3-29 and Cl. 3-31.

According to *sub-clause 1*, **the assured loses his right to claim compensation if notice of the casualty is not** given to the insurer within six months of the assured becoming aware of it. Due to the assured's duty of notification under Cl. 3-29, it will only rarely occur that the insurer has not been notified at an earlier stage. **The main purpose of the time-bar rules is to ensure that the insurer has knowledge of a casualty at a time when it is still possible to investigate and record facts that are relevant both for the recoverability and quantum of a potential claim, and therefore the time-limit should be relatively short.**

**In the 2019 Version**, the time-limit commences from the moment “the assured” became aware of the casualty. **Under previous versions, the group of people with which the assured was identified included also the master and the chief engineer. However, in the revision process leading up to the 2019 Version, it was considered inappropriate to apply such a wide identification. Consequently, the general identification rules in Cl. 3-36 to 3-38 apply also for notification of a casualty, and only the knowledge of the assured and those with whom he can be identified is relevant.**

A failure by the assured to notify the insurer of a casualty will often be due to the fact that he has not himself received any notification of the casualty from the master. Such failure will under Cl. 3-36 be regarded as a fault committed by the master in connection with his service as a seaman, which cannot be invoked by the insurer.

The time-limit commences from awareness of “the casualty”. When the insurer becomes liable for the assured's liability to a third party, “the casualty” is the actual event causing the damage. The assured must notify the insurer of this event within six months, provided that he had reasonable grounds for believing that a claim for damages would be brought against him.

*Sub-clause 2* stipulates an absolute time-limit for notification of 24 months regarding anything other than hull damage below the light waterline. If this rule should have an unfortunate consequence in a particular situation, Section 36 of the Norwegian Contracts Act may become applicable.

In all other **cases**, the limitations act in the state where the insurance contract was entered into shall apply. The limitations acts of the Nordic countries are as follows: the Danish Act: Lov om forældelse af fordringer of 6 June 2007, the Finnish Act: Lag om preskription av skulder of 15 August 2003, the Norwegian Act: Lov om foreldelse av fordringer (foreldelsesloven) of 18 May 1979 and the Swedish Act: Preskriptionslag of 29 January 1981.

#### **Clause 5–24. Limitation**

The provision was amended in the 2013 Plan. According to the 1996 Plan, the limitation period was running even if the claim was pending before the average adjuster. This provision conformed to the Norwegian Limitation Act, which is mandatory for the benefit of the debtor, cf. Section 28. The regulation in Denmark is similar. **The Commentary was amended in the 2019 Version.**

The regulation in Finnish and Swedish law is different. According to Chapter 19 Section 1, paragraph 2 of the Swedish Maritime Code the limitation period stops running when a claim is referred to the Official Average Adjuster. The same rule applies in Finnish law, cf. Chapter 19 Section 1, paragraph 7 sub-paragraph 6 of the Finnish Maritime Code. Such provision is not possible to include in the Nordic Plan due to the mandatory limitation regulation in Norway and Denmark. However, sub-clause 3 provides a new special duty of notification for the insurer so that the assured shall get a warning before the insurer invoke limitation, cf. further below.

If the insurance is divided among several co-insurers, the assured has to prevent the limitation period from running vis-à-vis all the co-insurers, cf. the Commentary on Cl. 9-4.

The main rule concerning limitation is contained in *sub-clause 1, first and second sentences*, which stipulate that the limitation period is three years from the end of the calendar year during which the assured acquired the necessary knowledge of the facts on which the claim is based. The term “acquired the necessary knowledge of the facts on which the claim is based” is taken from the Norwegian Insurance Contracts Act (ICA) and must be interpreted to mean that it is sufficient for the assured to know that a claim exists - he is not required to have knowledge about its extent. The assured therefore cannot plead that he does not possess the necessary knowledge merely because the claim is pending before an average adjuster. On the other hand, the Plan must be interpreted such that the assured must understand that he has a claim. The limitation period will therefore not start running until the assured becomes aware of the fact that the damage has been caused by an incident that is covered by the insurance. It is also important to emphasize that the insurer will often recognize - explicitly or tacitly - that the assured has a claim, at the same time as there is uncertainty, and perhaps disagreement, concerning its magnitude. In that event, the recognition of the existence of a claim of the assured will in itself be sufficient to prevent the limitation period from running. Accordingly, if, for example, the ship’s damage following a casualty has been surveyed and temporarily repaired, and

an estimate has been made of the costs of postponed permanent repairs, this must be interpreted as a recognition on the part of the insurer of the assured's claim, unless he makes explicit reservations against any liability at all.

Sub-clause 1, *third sentence*, stipulates an absolute limitation period of 10 years, and concords with Cl. 111 of the 1964 Plan, and relevant Nordic ICAs.

The provision in sub-clause 1 must, as far as hull insurance is concerned, be seen in conjunction with the rule relating to a five-year time-limit for repairs of damage, cf. Cl. 12-6. This is not a real limitation rule, because it implies that also the insurer's liability for costs that he has in actual fact accepted will cease. In practice, it will nevertheless to a large extent have the same effect.

The reference to the rules relating to limitation of the assured's liability for damages in *sub-clause 2* is taken from the Norwegian ICA Section 8-6, second paragraph. While the insurer's liability under the Norwegian ICA becomes time-barred under the same rules as those applicable to the assured's liability for damages, the assumption in the Plan is that this shall only apply if the rules relating to the assured's liability for damages provide a longer limitation period than the ordinary limitation rules. This specification is bound up with the special limitation rules in Chapter 19, notably Section 501, of the Norwegian Maritime Code. Of particular relevance in relation to hull insurance is Section 501, subsection 3 relating to claims for compensation arising from collision, which become time-barred two years from the day the damage was caused. If the claim against the insurer became time-barred at the same time as this claim for damages, this would result in a shorter limitation period than the ordinary one, whilst the purpose of the provision in the Norwegian ICA was to allow the assured to benefit from a possibly longer limitation period for the claim for compensation.

If the limitation period for the assured's claim for compensation is equal to or longer than the ordinary limitation period, the limitation period for the insurance claim will run in parallel with the limitation period for the claim for compensation. If the assured receives and pays the claim from the claimant immediately before it becomes time-barred, he risks that the claim against the hull insurer becomes time-barred before he has had time to lodge a claim against him. However, neither the Norwegian ICA nor the Limitations Act opens the door to introducing any further time-limits for the assured in this situation.

*Sub-clause 3* conforms to the Norwegian ICA Section 8-6, third sub-paragraph. NSA wanted a provision stating that the limitation period would be interrupted if the claim was submitted to an average adjuster. The consequence would then be that the claim could not be time-barred whilst it was pending before the average adjuster. Such provision was contained in the 1964 Plan Cl. 108 first sub-clause. It was, however, deleted in the 1996 Plan because it was considered to be contrary to the rules in the Norwegian Limitation Act, cf. above. The result was that the claim under the 1996 Plan

could be time barred during the period it was under adjustment, which could come as a total surprise for the assured. In order to protect the assured against this result, it was decided that the insurer should notify the assured if he wanted to invoke limitation for a claim that had been notified to the insurer within the time-limit for notification provided in Cl. 5-23. **A notification from the insurer as per this provision will not reduce or in any way limit the three year time-bar limit in sub-clause 1.**

This rule offers the assured a better protection than he has according to the Norwegian Limitation Act. However, the Norwegian Limitation Act Section 30 limit the application of the Act to questions concerning limitation that are not regulated in special legislation, and thus implies that special provisions concerning limitation in the Norwegian ICA take precedence over the rules in the Norwegian Limitation Act. As the new provision in sub-clause 3 conforms to the mandatory regulation in the Norwegian ICA Section 8-6, it is presumed that it will take precedence over the rules in the Norwegian Limitation Act.

As referred to in the Commentary to Cl. 5-23 the limitations act in the state where the insurance contract was entered into shall apply in all other respects to limitation.

#### **Clause 5–25. Rules regarding claims notice and limitation for insurance contracts subject to Finnish law and jurisdiction**

This Clause was new in the 2013 Plan.

Sub-clause 1 corresponds to Cl. 90, sub-clause 1, of the Finnish Marine Hull Insurance Conditions 2001 (English Version), but slightly rewritten to fit the terminology of the Plan. Sub-clause 2 corresponds to said Cl. 90, sub-clause 2. Sub-clause 3 corresponds to Cl. 91 of the said Finnish conditions. The parties' costs for preparing the case for the Finnish Average Adjuster are not covered under sub-clause 3.

## **Chapter 6 Premium**

### **General**

Chapter 6 contains rules on the payment of premium, additional premiums and reductions of premiums in certain situations. The Chapter has been greatly simplified in relation to the 1964 Plan, which contained a number of provisions that in practice were seldom or never applied. Accordingly, the following provisions have been deleted:

1. Cl. 114 of the 1964 Plan, which contained rules on premium reminders as an alternative to the ordinary procedure in the event of non-payment of a premium in Cl. 113 (now Cl. 6-2). The provision

corresponded to the Norwegian Insurance Contracts Act (ICA) Section 5-2, first paragraph, cf. Section 5-1, but under ICA the premium reminder is obligatory. The detailed and formal procedure was not very appropriate for shipowners' insurance, however, and the provision was thus not used in practice.

2. Cl. 115 of the 1964 Plan on fraud and dishonesty. Sub-clause 1, which affirmed that the full premium was to be paid in the event of invalidity due to fraud or dishonesty, conflicted with declaratory background law. In addition, the provision was of minor practical significance and of hardly any preventive effect.

Sub-clause 2, which conferred on the insurer entitlement to the full premium if the liability lapsed partially or in its entirety in the event of breach of the rules in Chapter 3 or Cl. 83, sub-clause 2, was superfluous. If the first breach led to the contract not being binding, it followed that no premium was paid either, cf. above. If, however, the consequence of the breach was that the insurer was entitled to disclaim liability for a casualty which had occurred, the contract ran in the usual manner, in which case a full premium was, of course, payable. If breaches of duties of disclosure or care led to the insurer cancelling the contract, it would already follow from Cl. 121 (now Cl. 6-5) that no premium would be paid for the time after the cancellation.

3. Cl. 117 of the 1964 Plan on additional premiums when the risk became greater than originally assumed due to incorrect information or an alteration of the risk, without the insurer being able to invoke Cl. 26 or Cl. 32, was viewed as impractical.

4. Cl. 119 of the 1964 Plan, on lapse of the entitlement to the premium when no risk attaches to the insurer, and Cl. 120, on the reduction of the premium when the sum insured is greater than the insurable value, were also impractical. Most situations in which the risk is reduced can be resolved using the provision in Cl. 6-5. If an exceptional situation arose which could not be brought within the provision or resolved through negotiations, background law, i.e. the Norwegian Contracts Act (*Avtaleloven*) Section 36: the doctrine on failure of implied basic assumptions, (translators note: roughly equivalent to frustration in Anglo-American law) could possibly be used to resolve the most inequitable situations.

5. Clauses 123-125 of the 1964 Plan on the calculation of return of premium during a stay in port were unnecessarily comprehensive and detailed, but the solutions have been worked into the Commentary on Cl. 6-6 on return of premium in the event of a stay in port.

In practice, the payment of the premium will often take place through a broker. Under English law, the broker is, in that case, liable to the insurer for the premium. By contrast, the 1964 Plan assumed that the issue of premium was a matter between the person effecting the insurance and the insurer and that the broker simply acted as the agent of the person effecting the insurance when the premium was paid

through the broker. This approach has been maintained in the new Plan. Since the broker is an intermediary and not a party to the contract, there is no need for a broker's cancellation clause as is used in English insurance conditions to allow the broker to cancel the contract if the person effecting the insurance does not pay the premium. The broker's status as an intermediary also makes it unnecessary to regulate the broker's relationship to the premium in the Plan text, although the use of a broker for paying the premium is referred to below in the Commentary where it is natural to do so.

In practice, it has been problematic that current payment routines lead to brokers being in possession of premiums and thereby earning interest income. This problem has been solved with the new broker regulations of 24 November 1995 No. 923.

### **Clause 6–1. Payment of premium**

This Clause was amended in the 2013 Plan.

Under *sub-clause 1, first sentence*, the person effecting the insurance is "liable to pay the premium". The premium may, however, be paid by another party, for example the assured. The key point of the provision is thus that responsibility for the payment rests with the person effecting the insurance.

For a person to have the status of "person effecting the insurance" and thus be liable for payment of the premium, it is a precondition that the person acts in his own name and becomes, in his own capacity, a party to the contract. If the insurance has been taken out by an agent acting in another's name, then the principal is the person effecting the insurance. If a manager takes out hull insurance on a ship which is co-owned by several shipowners, the manager will often act as an agent for the owners, giving the owners the status of persons effecting the insurance. In bareboat chartering, however, the bareboat charterer will most often be listed as the person effecting the insurance, for example because the charterer wishes to have the status of co-assured under the insurance contract. In the mutual associations the status of person effecting the insurance will usually depend on who has been accepted as a member of the association and not on whose account the insurance has been taken out, cf. ND 1983.79 DH FRENDØ, where the owners of the insured ships were listed in the insurance contract and given status as members of the association. As such, they were deemed to be persons effecting the insurance and held liable for the premium, despite the fact that, under the charterparty, the bareboat charterer was to keep the ship insured for his own account and was responsible for effecting the insurance and for all contact with the insurer.

Sub-clause 1, *second sentence* states that the premium falls due on demand in the absence of any agreement to the contrary.

It follows from what has been said by way of introduction that the rules on payment deadlines establish when the insurer is to have received payment of the premium. Accordingly, it is not sufficient that the person effecting the insurance has paid the amount to the broker.

*Sub-clause 2* contains a provision on interest on overdue payments and refers to the rate of interest provided for in Cl. 5-4, sub-clause 4. This provision was amended in the 2013 Plan in order to adapt the Plan to its future application in Denmark, Finland and Sweden.

### **Clause 6–2. Right of the insurer to cancel the insurance in the event of non-payment of premium**

This Clause corresponds to Cl. 113 of the 1964 Plan.

The provision corresponds to the Norwegian Insurance Contracts Act (ICA) Section 5-2, with the difference that the ICA provision contains detailed rules on obligatory premium reminders, cf. also Cl. 114 of the 1964 Plan, and rules on protection of the person effecting the insurance if the non-payment is due to unforeseen impediments for which he cannot be blamed. There is no need for such comprehensive protection in marine insurance, and ICA Section 5-2, including the second sub-clause on unforeseen impediments is, accordingly, not applicable to insurance based on the Plan.

By contrast, ICA Section 5-3, on when payment is deemed to have taken place, does apply to marine insurance as well. For the person effecting the insurance to be able to invoke the provision in the event of late payment, however, the premium must have been sent to the insurer. A delay in sending the amount from the person effecting the insurance to the broker is, accordingly, irrelevant, cf. the general comment above.

### **Clause 6–3. Premium in the event of total loss**

This Clause corresponds to Cl. 116 of the 1964 Plan. The Commentary was amended in the 2010 version.

*Sub-clause 1* is identical to Cl. 116 of the 1964 Plan, and is in line with established international practice in shipowners' insurance to the effect that the full premium is to be paid for the current insurance year when a total loss has occurred. In loss-of-hire insurance, total loss occurs when the entire liability period is expended.

Shipowners' insurance is usually taken out for a year at a time, meaning that the insurer will be able to demand one year's premium. The same applies, however, if it has been agreed that the insurance is to attach for a period longer than one year. In such case, it follows from Cl. 1-5, sub-clause 4, which was added in the 2003 version, that the insurance period is to be divided up into one-year periods in

relation to, *inter alia*, Cl. 6-3, sub-clause 1. The calculation of the insurance period in these cases is explained in further detail in the Commentary on Cl. 1-5. In mutual insurance the rule has been adapted to the insurance conditions.

Under the provision, the insurer is entitled to the “entire agreed premium”. This poses no problem in relation to hull insurance. On the other hand, the rule cannot apply to the loss-of-hire premium in the event of a total loss under the hull cover. Under Cl. 16-2, a total loss under the hull insurance does not entitle the assured to loss-of-hire insurance. This means that the risk of the loss-of-hire insurer ceases in the event of a total loss, and that the insurer may only require payment of the loss-of-hire premium up to that date. The cut-off time for the duty to pay loss-of-hire premium in such cases is the time at which the casualty occurred. The duty to pay premium therefore ceases to apply at the same time, regardless of whether it is a question of a total loss which is ascertained at the time of the casualty or a condemnation settlement, which takes longer. If the insured has paid premium for the period of time after the casualty occurred, he is entitled to a reduction in premium for this amount.

A precondition for the application of the provision in sub-clause 1 is that the insurer actually pays total loss compensation during the insurance period. If the insurer is able to disclaim all or part of the liability because the total loss is due to a peril which is not covered by the insurance, the insurer should only be able to demand full premium for that period during which he bore the risk. This is expressed in *sub-clause 2*. If the loss has been caused by a combination of marine perils and war perils and liability is to be shared equally between the two groups of insurers pursuant to Cl. 2-14, the marine perils insurer may only demand half of the premium for the remaining portion of the insurance period. If the loss was partly caused by another peril that is expressly excluded and liability is apportioned according to the general apportionment rule in Cl. 2-13, the reduction in premium must be adjusted to reflect the apportionment fraction.

Under the 1964 Plan it was assumed that the exception in Cl. 116, sub-clause 2, only applied in the case of objective exclusion of perils. In the event of breach of the duties of disclosure or of care, the person effecting the insurance was to pay the full premium regardless, pursuant to Cl. 115, sub-clause 2. This provision has now been deleted, cf. the introduction to this Chapter, with the consequence that the exception in Cl. 116, sub-clause 2, will also cover a situation in which the total loss is totally or partially due to breach of the duties under Chapter 3. Consequently, the person effecting the insurance will always be entitled to a reduction of or to be released from the obligation to pay premium for the remaining insurance period, in so far as the insurer can disclaim liability for the total loss, wholly or in part. Full premium shall always be paid for the time up to the casualty, unless the contract is invalid, cf. above.

In the event of an ordinary total loss, the ship's insurances lapse at the time of the loss. Accordingly, the premium shall only be paid up to that time, unless either the insurer in question is liable for the

total loss, or there is a specific provision in the insurance conditions on the right of the insurer to receive a premium. However, in the event of condemnation or abandonment, or if the insurer wishes to avail himself of the deadline under Cl. 11-2, sub-clause 2, to attempt to salvage the ship, there will be a period of uncertainty during which one will not know whether total loss compensation will be paid, or whether the other insurances will lapse or continue to run in return for full premium during the period of repairs, cf. ND 1945.433 Oslo HAAKON JARL. If, in such cases, it turns out that total loss compensation is to be paid, it followed from Cl. 116, sub-clause 2, second sentence of the 1964 Plan that the risk for the other insurers had to be deemed to have lapsed at the time of the casualty. This provision has been deleted, although the intention is not to effect any changes on points of substance. If the ship has been abandoned, the risk must be deemed to have lapsed at the last time there was any information about the ship.

The 1964 Plan also contained a rule on depositing the premium until the issue of total loss was finally settled. This has also been found to be superfluous and has been deleted. If the issue is still not resolved at the expiry of the insurance period, the issue of a possible extension of the insurance, and the issue of the insurer's entitlement to a premium, must be resolved under the rules in Cl. 11-8 and Cl. 6-4.

#### **Clause 6–4. Additional premium when the insurance is extended**

This Clause is identical to Cl. 118 of the 1964 Plan.

*Sub-clause 1* must be viewed in connection with the right to an extension of the insurance period. The provision is of significance in relation to both hull insurance and the separate insurance for total loss, cf. reference to the hull insurance rules in Cl. 14-3.

If, after arriving in port, the ship turns out to be condemnable, an insurer who is not liable for the total loss will not be liable for new casualties occurring after the casualty which caused the total loss, cf. sub-clause 11-9, sub-clause 1. In cases such as this, the insurer may only demand a premium for the time up to the casualty, cf. the Commentary on Cl. 6-3. There can accordingly be no question of extending the insurance.

Under Cl. 11-9, sub-clause 2, the insurer who is liable for the total loss shall cover all collision liability occurring after the casualty but before compensation is paid and which falls under the hull insurer's liability pursuant to the rules in Chapter 13. In this case, however, the insurance will not be “extended pursuant to Cl. 10-10”, cf. sub-clause 1 of This Clause, and the insurer cannot demand a separate premium for this liability cover. As soon as it is discovered that the ship is condemnable, it is clear that the insurer who is liable for the total loss is to receive a full year's premium, cf. Cl. 6-3, sub-clause 1. The liability of the other insurers is deemed to have lapsed as at the time of the casualty.

Sub-clause 2 regulates the entitlement of the insurer to a premium when it is not known at the expiry of the insurance period whether the assured will be entitled to claim compensation for total loss under the rules in Cl. 11-2, sub-clause 2, Cl. 11-7 and Cl. 15-11. The wording “at the expiry of the insurance period” must in this case be interpreted as meaning the expiry of the agreed insurance period regardless of whether it has been agreed that the insurance period is to attach for one year or for more than one year, compare Cl. 1-5, sub-clause 4, which explicitly mentions the provisions under which a multi-year insurance contract shall be divided up into one-year periods. The present provision is not included. If, at the expiry of the insurance period, the ship is stranded, but the insurer wishes to avail himself of the right to attempt to salvage it pursuant to Cl. 11-2, sub-clause 1, no premium shall be paid as long as it is not known whether the salvage attempt will be successful. If the ship is salvaged before expiry of the deadline, it will normally have sustained damage that would make the extension rules in Cl. 10-10 applicable. The premium will then begin to run again from the time the assured “gained control of the ship”, which in this situation will mean that it has been re-floated and can commence moving to a repair yard. If, however, it turns out that the ship is condemnable, the rules set out in the preceding sub-clause will have to be applied.

Under Cl. 11-7 and Cl. 15-11, the assured may claim compensation for total loss upon expiry of certain specified time periods when the ship has disappeared, been abandoned by the crew or been taken from the assured. If, at the expiry of the insurance period, it is not known whether compensation for total loss will be claimed under one of these rules, all payment of premiums is to cease. If compensation for total loss is subsequently paid, the settlement of premiums must take place along the lines described above pertaining to a case of condemnation.

Even though the time limit under one of the above-mentioned sub-clauses has expired, the assured may, however, still keep the issue of compensation open if, due to economic factors, he prefers to have the ship back rather than receive total loss compensation. This will be particularly relevant in wartime. If the ship is found before the assured has claimed compensation for total loss, the insurance shall under Cl. 11-8 be extended until the ship has reached port, and the rules in Cl. 10-10 shall apply after that. Under the present clause, sub-clause 2, the premium will begin to run again from the time the assured, or someone on his behalf, gains control of the ship.

If the ship becomes a total loss after it has been found but before the extended insurance extension has expired, the insurer may not demand a new, full year's premium. What the insurer may claim pursuant to Cl. 6-3 in the event of total loss is the entire "agreed premium", but an extension of insurance does not imply any agreement on insurance for a new insurance year. In this case, an additional premium shall only be paid for the period as of when the assured gained control of the ship until it was lost.

## **Clause 6–5.      Reduction of premium**

This Clause corresponds to Cl. 121 of the 1964 Plan and relevant Nordic Insurance Contracts Acts (Nordic ICAs) relating to termination of the insurance during the insurance period.

The term “insurance period” must be interpreted here as the expiry of the agreed insurance period regardless of whether the insurance period agreed upon is for one year or for several years, compare Cl. 1-5, sub-clause 4, which explicitly mentions the provisions where a multi-year insurance contract is to be divided up into one-year periods. The present provision is not included.

Under the 1964 Plan, a pro-rata reduction of the premium could only be claimed if the insurance period became shorter than agreed upon or if the insurance was rendered inoperative pursuant to Cl. 37, sub-clause 3, Cl. 41 and Cl. 44. The authority for the pro-rata reduction has now been generalised, so that a pro-rata reduction may also be effected when the suspension is due to circumstances attributable to the assured or the person effecting the insurance, e.g. when the ship navigates into an excluded trading area with the consent of the assured, cf. Cl. 3-15, sub-clause 3.

The Clause only applies to a reduction of the contractually agreed charge for the insurance. This does not, of course, exclude the insurer being entitled to demand compensation from the person effecting the insurance or the assured, if he has sustained an economic loss due to the circumstance which has caused the insurance to lapse and the conditions for compensation are otherwise met.

During the revision, there was also discussion as to whether the shipowner needs to have the possibility of terminating the insurance if the risk becomes less than agreed upon or disappears altogether. Out of consideration for the insurer's reinsurance cover, however, it is difficult to give the shipowner general authority to terminate the contract in these types of situations. If there is an obvious disparity between the agreed premium and the risk incurred, the parties will usually agree on some premium reduction. If not, the issue may have to be resolved under the rules on failure of implied basic conditions or the Norwegian Contracts Act (*Avtaleloven*), Section 36.

## **Clause 6–6.      Reduction of premium when the *vesse*/is laid up or in similar situations**

This Clause corresponds to Cl. 122 of the 1964 Plan, Cefor V.1, sub-clause 1, and PIC Cl. 9.

Cl. 122 of the 1964 Plan did not contain any basis for a return of premium, but stated that if the parties had entered into an agreement on the matter, the premium reduction was to be calculated according to the rules in clauses 123-125. These rules were modified somewhat in the Special Conditions, cf. Cefor V 1, sub-clause 1, and PIC Cl. 9. The present Clause is based on the solutions in the Special Conditions, with some modifications.

The condition in *sub-clause 1*, to the effect that the entitlement to a return of premium is subject to the ship having been in one location for an uninterrupted period of at least 30 days with no cargo on board, is taken from the Special Conditions. The date of arrival and the date of departure are not to be included in the calculation of the length of stay. It makes no difference, for the purposes of the calculation, if the old insurance contract expires and a new one begins to run while the ship is in port; the decisive factor is the cumulative stay.

The provision assumes that the ship is lying "at one location for an uninterrupted period". Moving the ship within a port area is not to be deemed an interruption, unless the move is part of the voyage and the ship is held up before final departure. The issue of whether there is one or more locations (ports) must be decided as a question of fact according to the geographic and commercial circumstances at the place in question. Clauses 123 and 124 of the 1964 Plan and Cefor V.3 and PIC Cl. 9.3 contained detailed regulation of these and other questions. Even though the provisions are not repeated in the text of the Plan, it is assumed that the calculation method in future shall be based on the same principles.

The provision in sub-clause 1 only applies when the ship is laid up or more or less laid up, cf. the condition "with no cargo on board". This is a somewhat more narrow formulation than in the Special Conditions, which set out common rules for lay-up and other stays in port, etc. The ordinary reduction of premium rules should not usually be applied, however, in the case of a stay in port which occurs more or less by chance, during which the ship is earning full freight, cf. the criticism of the Special Conditions in *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 340-341. Nevertheless, it is not a precondition for negotiations for a premium reduction that the ship is without freight income. Negotiations must also be possible in a situation in which a rig is laid up with its operating expenses covered but with orders to reduce operating expenses as much as possible.

The Special Conditions also contained a prerequisite that the ship be laid up "under safe conditions" and detailed provisions as to how these requirements were to be met. This has been deleted. Given that the provision now applies only to lay-up and similar stays, because under Cl. 3-26 the insurer is to approve the lay-up plan, and the requirement for safe conditions thereby becomes superfluous. In addition, the issue of safe conditions should affect the scope of the premium reduction and not be a condition for the return of premium.

When the conditions have been met, the assured is entitled to "demand negotiations" for a reduction of premium. This is a change in relation to earlier practice. While Cl. 122 of the 1964 Plan assumed that the scope of the premium reduction was a subject for negotiation, the Special Conditions operated with set return-of-premium rates. The general rule was that the return of premium was to be 90% with a minimum premium of 0.35% p.a. During the revision, there was agreement that the issue of return of

premium had to be a subject for negotiation and not a general and automatic right for the assureds, *inter alia* because a set rate might possibly be in conflict with the rules on price collaboration in the Norwegian Competition Act (*Konkurranseloven*). Accordingly, the return of premium rates must be agreed upon individually. This may be done either at the time the insurance contract is entered into or at a later time when lay-up, etc. enters the picture. This last approach is the most practical because that is when one has the best overview of the factual circumstances, although it does give the insurer a clear advantage in negotiations.

Particular return-of-premium issues arise when the ship is laid up at a shipyard. It follows from the general rule that the assured will not be entitled to a return of premium in such cases, but may negotiate with the insurer for a premium reduction if the conditions in sub-clause 1 are met. It is nevertheless less common to obtain a return of premium in the case of a stay at a shipyard than in the case of ordinary lay-up. Even though the navigation risk will be reduced, the total risk may in fact increase as a result of the increased risk of damage due to fire or explosion. In certain circumstances the question may therefore rather be whether an additional premium should be paid for the stay at a shipyard. This issue must be resolved by applying the ordinary rules on alteration of the risk. If the stay at the shipyard is a relevant alteration of the risk under Cl. 3-8, the insurer may cancel the insurance pursuant to Cl. 3-10 and then demand an increase in premium to resume the cover.

*Sub-clause 2* corresponds to Cl. 125 of the 1964 Plan, but sub-sub-clause (b), which stipulated that the insurer was entitled to the full premium during a stay in port when the ship was in a port at which it could only call subject to an additional premium, has been deleted. This is also an issue that must be left to the parties to negotiate.

## **Clause 6–7. Claim for a reduction of premium**

This Clause corresponds to Cl. 126 of the 1964 Plan.

Cl. 126 of the 1964 Plan contained deadlines for the bringing of claims for a reduction of premium, but made no provision for sanctions if the deadline was not complied with. The deadline provision has, accordingly, been amended to become a pure time-bar rule, so that the claim lapses if the deadline is not complied with. The provision applies whenever the duty to pay premium of the person effecting the insurance lapses wholly or in part under the rules in Chapter 6.

The "insurance year" means a period of one year, starting at the time the insurance came into effect. If the insurance contract is continuous, the insurance year will be a period of one year, starting from the time of expiry of the preceding insurance year. The insurance year may coincide with the calendar year, but need not do so.

Sub-clause 2 of the 1964 Plan provision conferred on the insurer the right to charge a reduction fee if the claim for a premium against the person effecting the insurance lapsed. This provision was of little significance in practice and has been deleted.

## Chapter 7

### Co-insurance of mortgagees

#### General

There were no amendments to the clauses in Chapter 7 in 2016, but the Commentary to all Chapter 7 clauses was rewritten, as well as this introduction to the Chapter.

Co-insurance of a mortgagee's interest is part of a larger set of problems concerning co-insurance of third parties. In the Plan, the rules on co-insurance of third parties are split between two chapters. Chapter 8 contains the general rules on co-insurance of third parties, whereas the rules relating to co-insurance of mortgagees are dealt with separately in this Chapter 7. This is due to the practical importance co-insurance of mortgagees has played, with loan agreements usually containing provisions relating to insurance of the interests of the mortgagee.

Under the heading General in the Commentaries to Chapter 8, the concept and use of co-insurance in traditional Nordic insurance law is explained. As mentioned there, the most common and practical co-insurance of third parties is that of the mortgagee. Chapter 7 provides an automatic cover of the mortgagee's interest under the insurance. This means that the mortgagee is co-insured, regardless of whether the insurer has received any declaration to that effect. This is in contrast to the general rules of Chapter 8, where there is no automatic cover under the insurance to other third parties. The protection of the mortgagees is regulated exhaustively in Chapter 7, but does not provide the mortgagees with an independent cover.

The mortgagee will lose protection due to acts or omissions on the part of the person effecting the insurance or the assured who is responsible for the operation of the ship, see Cl. 7-1 *in fine*. However, extended cover of the mortgagee's interest can be provided by giving the mortgagee independent co-insurance, or by establishing a completely independent cover, i.e. cover that is not linked to the owner's insurance. Cl. 8-7 allows for the possibility of independent cover of a third party's interest, including a mortgagee, linked to the shipowner's insurance. As mentioned in the Commentaries to Cl. 8-7, the cover provided for the mortgagee in Cl. 8-7 is limited to the insurance to which it is attached and cannot be a complete substitute for a so-called Mortgagee Interest Insurance.

In practice, the position of the mortgagee is often specifically regulated in the insurance contract. Such specific provisions in the contract will have priority over the rules in Chapter 7. If the position of the mortgagee is incomplete in some respect in such provisions, the rules of Chapter 7 may supplement them.

### **Clause 7-1. Rights of a mortgagee against the insurer**

The Commentary to this Clause was rewritten in 2016.

*Sub-clause 1* states that the mortgagee's interest is automatically covered. The mortgagee is co-assured even though notice is not given pursuant to sub-clause 2. The consequence of failure to give such notice is simply that the mortgagee will not have the benefit of the protection provided for in clauses 7-2 to 7-4. This approach with automatic co-insurance for holders of registered charges is in line with relevant Nordic ICAs.

The Clause applies when the ship is "mortgaged", that is when a charge is created by agreement. Chapter 7 does not protect maritime liens and similar liens. It is not necessary that the charge is registered, but if the mortgagee's right is not legally protected, his right as a co-assured will not be protected against the creditors of the shipowner, cf. Rt. 1939.343 NH.

Sub-clause 1 also establishes the principle that the co-insurance is not independent. This is achieved by way of a reference to the general rules governing identification in Cl. 3-36 to Cl. 3-38. On this point the Plan deviates from the solution in the relevant Nordic ICAs.

The rule in Cl. 3-37 implies that the mortgagee must be identified with the assured or co-owner who has decision-making authority for the operation of the ship. This means that the mortgagee does not acquire any greater rights than the person who is responsible for the operation of the ship. If the party in charge of the operation of the ship is responsible for a breach of safety regulations or sends the ship into excluded trading areas without the insurer's consent, the mortgagee will thus have to accept a loss of cover under Cl. 3-25 or Cl. 3-15, sub-clause 5, provided that the other conditions for applying sanctions against the assured are met.

If the ship sails into a conditional trading area without prior notice to the insurer, the sanction is that the assured, in the event of damage, only receives compensation subject to a deductible of one fourth, however, up to a maximum of USD 200,000, cf. Cl. 3-15, sub-clause 3. This will also apply in relation to the mortgagee.

If the responsible assured has delegated decision-making authority which is of material significance for the insurance to another organisation or person, Cl. 3-36, sub-clause 2, cf. Cl. 3-37, entails that the

mortgagee must also be identified with that person or organisation. If responsibility for the operation of the ship has been delegated to several parties, the mortgagee must be identified with all of those responsible parties. Nor does the mortgagee acquire any greater rights than the assured if the insurer has paid out compensation to which it subsequently turns out the assured was not entitled. If the *condictio indebiti* rules lead to the assured having to pay the compensation back to the insurance company, the mortgagee must do so as well, cf. ND 1985.126 NH BIRGO and Rt. 1995.1641 TORSON.

The cover is, however, independent in relation to other co-assureds who are not responsible for organising the operation of the ship, for example co-owners without such responsibility or other mortgagees. If they make a mistake, the cover of that mortgagee remains intact.

It also follows from the reference to Cl. 3-38 that the mortgagee must be fully identified with the person effecting the insurance. If the person effecting the insurance breaches his obligation to give correct and complete information or to pay the premium, the mortgagee will not have any rights against the insurer, either. General principles of contract law dictate that the mortgagee must also be identified with any agents or sub-contractors the person effecting the insurance may use, for example, if the contract is entered into through a broker.

Naturally, the mortgagee does not acquire any greater rights than the assured in relation to limitations of the scope of cover that are not linked to the issue of breach of obligations for the assured, for example, the war risk exclusion in an insurance against marine perils or the exclusion for insolvency. This is true even though the limitation of cover may seem like a reaction to negligence on the part of the assured, but is drawn up completely objectively, e.g., the limitation of liability for damage caused by inadequate maintenance in Cl. 12-3. It is unnecessary to spell this out explicitly in the Plan text.

The principle of dependent co-insurance creates a degree of uncertainty for the mortgagee. If, for example, the ship is lost due to a breach of a safety regulation for which the assured must be blamed, the mortgagee risks being left without cover. For insurance of ocean-going ships, this "subjective risk" is extremely small. It is, however, conceivable that the mortgagees may wish to insure themselves against this risk as well. This can be done through independent mortgagee cover in connection with the shipowner's insurance, cf. Cl. 8-7. For ships trading in American waters, the mortgagee may also need to take out Mortgagee Interest Additional Perils (Pollution) insurance (MAP) to ensure priority for his mortgage in situations where clean-up costs, etc. in relation to the American Oil Pollution Act give maritime liens on the ship priority over charges created by agreement.

The fact that the mortgagee's cover is not independent does not mean that the person effecting the insurance may arbitrarily give up his, and thereby the mortgagee's, rights under the insurance. Several provisions in Clauses 7-2 to 7-4 serve to protect the mortgagee against this eventuality and against the

prospect of compensation being paid out by the insurer without it benefiting the mortgagee. To achieve this protection, however, the mortgagee must arrange for the insurer to receive notice of the creation of the charge, see *sub-clause 2*. If the mortgagee fails to give notice but the insurer learns of the creation of the charge in some other way, this must however be sufficient for the expanded protection to apply.

The rule in *sub-clause 3* is not a substantive rule, but only intended for informative purposes: the mortgagee is covered pursuant to Cl. 7-2 to Cl. 7-4 even if the insurer neglects to give the prescribed notice.

## **Clause 7–2. Amendments and cancellation of the insurance**

The Commentary to this Clause was rewritten in 2016.

The first sentence of the provision states that amendments to or cancellation of the insurance contract may not be invoked against the mortgagee unless he has been notified by the insurer. This expands somewhat the mortgagee's protection in relation to the general rule in Cl. 7-1, and is in conformity with the principles laid down in the Nordic ICAs. In the 2002 revision, however, it was emphasized that, upon cancellation of a war risk insurance contract, the position of the mortgagee is no better than that of the person effecting the insurance himself, see the reference in the provision to Cl. 15-8, sub-clause 1, second sentence.

The mortgagee is entitled to be notified in the event of amendments to the insurance contract during the insurance period and in the event of renewal of the insurance. He does not need to be notified, however, if the insurance expires because it is not renewed, cf. below. The duty to notify rests with both the leading insurer and the co-insurers. The notice period is 14 days.

In marine insurance it is not considered expedient to require the insurer to notify the mortgagee when the insurance expires. A marine insurance contract signed on the terms of the Plan lapses automatically upon expiry of the insurance unless it is renewed by the person effecting the insurance, cf. Cl. 1-5, sub-clause 3, and a duty to notify would have required the insurer to keep track of failures to renew. Furthermore, the Plan contains a number of rules to the effect that the insurance expires automatically or is suspended without the insurer having to be aware of this, cf. Cl. 3-14 on loss of the main class, Cl. 3-15 on trading area and Cl. 3-21 on change of ownership. In such cases, it will not be possible for the insurer to give notice before he has received notice himself of the reason for the expiry, which can take a long time. The issue of expanded protection of the mortgagee's interest upon sale of the ship is usually resolved by the purchaser always taking out new insurance as of the time of take-over.

### Clause 7–3. Handling of claims, claims adjustments, etc.

The Commentary to this Clause was rewritten in 2016.

*Sub-clause 1* reflects the situation in marine insurance where it is most practical for the person effecting the insurance or the assured who is responsible for the operation of the ship, to have authority to negotiate the settlement of the claim with the insurer. It would be inexpedient and bothersome to involve the mortgagee in every single settlement of a claim. Moreover, Cl. 7-4 ensures that the mortgagee has reasonable control over the payment of compensation, so that his interests are given sufficient protection. If, exceptionally, the mortgagee wishes to be in a better position in relation to the claims settlement, this must be agreed separately with the insurer. An agreement of this type may be reached right up to the time of payment of the compensation.

Under *sub-clause 2*, the right to compensation for total loss may not be waived, in full or in part, to the detriment of the mortgagee. It could be argued that the protection of the mortgagee should be expanded to apply to every payment of cash compensation (including compromised total loss), cf. Cl. 12-1, sub-clause 4 and Cl. 12-2, but this was deemed unnecessary. The mortgagee will in such cases have the protection afforded by Cl. 7-4, sub-clause 3.

### Clause 7–4. Payment of compensation

The Commentary to this Clause was rewritten in **the 2013 Plan Version 2016 and further amended in the 2019 Version**.

*Sub-clause 1* gives the mortgagee priority in the event of total loss. Parties other than the owner may also be entitled to compensation. Hence, the rule states that the mortgagee is given priority against all other possible claimants under the policy.

*Sub-clause 2* regulates the settlement of partial losses, **i.e. where the object insured has been damaged without the rules relating to total loss being applicable**. If the compensation is used to cover the cost of repairs, the mortgagee's interest will normally be protected, since the value of the mortgaged object is usually restored in such cases. Consequently, the mortgagee should not be able to object to such a payment and there is therefore no reason to require his consent. The threshold for payment is 5% of the sum insured, **which as a starting point is applicable for each individual interest. However, for certain interests such as loss of hire insurance and liability insurance other provisions apply, cf. sub-clauses 4 and 5. For the hull insurance, this is a combined threshold for both damage repairs and costs of measures to avert or minimise loss, whilst**

**collision liability covered by the hull insurance is regulated by sub-clause 5 below.** If a lower **threshold than 5%** is needed, a separate agreement must be reached for that purpose.

A particular issue arises when the shipowner goes bankrupt after the repairs have been carried out but before the shipyard has received payment. If the ship is still at the shipyard, the shipyard may retain the ship to enforce payment of the entire repair invoice. The insurer will, in relation to the mortgagee, not be able to pay out the amount to the bankrupt estate unless the shipyard has been paid in full, cf. the wording "upon presentation of a receipted invoice for repairs carried out". The natural course of events may then be that the insurer pays the shipyard directly. If, however, the shipyard has not exercised its possessory lien and has let the ship sail, it is difficult to see why it should be in a better position than an ordinary creditor. In these types of situations, it is better to fall back on general rules of bankruptcy law, which entail that the insurance compensation goes into the bankrupt estate and that the shipyard only has a claim for a dividend. This approach should not create particular problems for the mortgagee.

*Sub-clause 3* states that compensation under Cl. 12-1, sub-clause 4, and Cl. 12-2 may not be paid without the consent of the mortgagee. The provision is general so that the mortgagee's right to give consent applies in relation to everyone, cf. the comments above under sub-clause 1. Since the compensation in such a case is a substitute for the reduction in the value of the mortgage, the mortgagee must be entitled to have the compensation paid to him against a corresponding reduction of the mortgage.

The provisions in sub-clauses 1 to 3 only apply in relation to mortgagees holding security in the capital value of the ship. *Sub-clause 4* gives a mortgagee holding security in the ship's freight income the same security in the event of loss-of-hire as other mortgagees have in relation to payments under the hull cover. However, mortgagees holding security in the value of the ship or other security have no claim for protection in relation to payment under the loss-of-hire insurance.

*Sub-clause 5* states that liability to a third party (collision liability, etc.) may only be paid by the insurer upon presentation of a receipt. Under some legal systems, like the Norwegian, the rule is, strictly speaking, superfluous, since the insurer is liable towards third parties if he pays compensation to others without having ascertained whether the claims of the third parties have been covered. The rule has nonetheless been retained out of consideration for the international market.

*Sub-clause 6* relates to the insurer's right to set-off. Since set-off may be relevant to amounts due to the insurer other than the premium, for example, for disbursed advances for previous damage which exceed the repair invoice, the right to set-off is stated in general terms. However, the right to set-off is limited to claims which arise from the insurance contract for the ship in question, since it is not possible to require the mortgagee to keep abreast of premium arrears or other claims which arise for

the assured's other ships. Furthermore, it is reasonable to apply a certain time frame. The rule therefore states that set-off against premium arrears and other claims may only be made for claims which have fallen due during the last two years.

The time limit is linked to payment of the compensation. This may entail some inconveniences if there are two years of premium arrears at the time of the casualty. In that case, the insurer will not simply be able to deduct these arrears in the compensation to be subsequently paid. The insurer must, however, have the opportunity to draw up an advance calculation as soon as the extent of the casualty has been established, and set off two years' arrears in that calculation. It is furthermore a condition that the right of set-off may only be used once per casualty. The insurer may not, in the middle of a dragged-out settlement of claim, prepare successive advance calculations and compensate more than two years' premium arrears altogether.

The limitation on the right of set-off applies not only to payment of total loss compensation when the mortgagee is to be paid in full, but also to payment of compensation for damage. From the point of the view of the mortgagee, it is of fundamental importance that the insurance ensures at all times that the shipowner has the necessary funds to carry out repairs so that the ship may be kept in operation.

## Chapter 8

### Co-insurance of third parties

#### General

In 2016, Chapter 8 had some new clauses added, see Cl. 8-2, Cl. 8-3, Cl. 8-5 and Cl. 8-6, whereas other clauses were amended and/or given a new placing, see Cl. 8-1, Cl. 8-4 and Cl. 8-7. The Commentary to all the clauses was rewritten, and this introduction to the Chapter was new.

In accordance with Nordic tradition and the Insurance Contract Acts of the Nordic countries, a marine insurance contract is a contract entered into between the insurer, cf. Cl. 1-1 litra (a), and the person effecting the insurance, cf. Cl. 1-1 litra (b). The term “the person effecting the insurance” is not a term commonly used outside the Nordic countries. If the person effecting the insurance enters into a marine insurance contract to insure his own ship, he is both the person effecting the insurance and the assured, as this term has been defined in Cl. 1-1 litra (c), since he is “the party who is entitled under the insurance contract to compensation” in case of a casualty. In practice, this assured owner is often called the “principal assured”, but the term is not used in any of the clauses of the Plan.

The term “the assured” is defined in Cl. 1-1 litra (c) to make room for others than the “principal assured” to be included as assureds under the insurance contract. This is done by making use of the

concept of co-insurance. There may be a number of reasons why the benefit of an insurance is extended to others. In many cases, the principal assured has committed himself to do so in a separate contract with a third party. The most common and practical case is that of the mortgagee. Here, the Plan's Chapter 7 provides an automatic cover of the mortgagee's interest under the insurance, making the mortgagee a co-insured party. As for other third parties, no automatic cover under the insurance will apply. For a third party to be given specific rights under the insurance, the insurance has to be explicitly effected for the benefit of that third party, cf. the Plan's Chapter 8.

Chapter 8 is applicable to all co-insured third parties other than the mortgagees. The protection of contractual mortgagees is exhaustively regulated in Chapter 7, but the mortgagees may obtain an extended protection pursuant to Cl. 8-7, see further the Commentary to that Clause. The rules in Chapter 8 apply when a specific and explicit agreement is concluded to the effect that the insurance shall also apply for the benefit of one or more third parties other than the contractual mortgagees. The most frequently occurring example is in connection with insurance of MOUs, cf. Cl. 18-1 litra (i).

The mechanism of co-insurance of third parties is used for a variety of reasons in different contexts. The need for co-insurance may conveniently be divided into three issues:

*Firstly*, it can be used to cover what might be described as a "value interest". Either a co-insured third party can have an interest in the economic value of the insured object, or in the income it produces. One example is the interest of the owner of equipment that is placed on board the vessel. This interest could be co-insured under the owner's hull insurance, see Cl. 10-1 litra (b). Another example is owner's supplies and stage payments, which can be co-insured under a builders' risks insurance taken out by the yard, see Cl. 19-3, cf. Cl. 19-9. It is also feasible, although seldom done in practice, to insure the loss of income of both the owner and a time charterer under a single insurance contract. A less common example could be that a buyer of a ship is co-insured under the owner's (seller's) insurance contract for a limited period, e.g. until the vessel is delivered. Since Cl. 3-21 provides that cover terminates when there is a change of ownership, such co-insurance of a buyer's interest has to be arranged by special agreement. In bareboat charterparties, the bareboat charterer often has the duty to take out both hull and P&I insurance. The bareboat charterer is liable to redeliver the vessel in the same condition as when he took it over, but the charterparty terminates if the vessel becomes a total loss. In such a case, the hull insurance may protect both the charterer's value interest in recovery for the cost of repairs of any damage incurred and the owner's interest as he will be compensated for the value of the vessel in the event of a total loss.

*Secondly*, co-insurance can be used to cover a third party's "liability interest". Managers, charterers of various kinds and others can become directly liable to third parties who suffer loss as a consequence of a vessel's operation. It is common practice to name managers of various types as co-insured, as they may have significant exposure to liabilities covered by different Plan insurances. Hull insurance under

the Plan is a combined insurance as collision and striking liability for vessels is covered pursuant to Chapter 13 and for MOUs by Chapter 18, Section 2-4. Chapter 15 on war risks insurance, Cl. 15-2 litra (e) and Section 7, includes full scale P&I insurance against war risks. The same goes for coastal and fishing vessels, which have liability insurance cover by virtue of Chapter 17, Section 6. Liability insurance can also be purchased under the builders' risks insurance in Chapter 19, Section 4. If co-insurance of a third party is agreed, Chapter 8 is applicable to all these liability schemes unless departed from as in Cl. 18-1 litra (i) or in the individual insurance contract.

*Thirdly*, the co-insurance can merely protect a third party from a subrogation claim by the insurer. The term “protective co-insurance” is sometimes used for this type of co-insurance. It refers to the situation where a third party is exposed to liability for loss of or damage to the insured object itself or where another assured might otherwise expose him to a claim. In such a case, the third party and the person effecting the insurance may agree to include the third party as a co-insured under the insurance. If the insurer has covered the loss to the assured, the status as co-insured would protect the third party against a possible subrogation claim from the insurer. Similarly, if the assured should elect to bring action against the third party instead of claiming under the insurance, the co-insured third party would be able to avail himself of the insurance cover. The central idea behind both situations is that the loss, damage or claim should rest with the insurer according to the insurance conditions, without him being able to seek recovery from or deny cover to the co-insured third party. In other words; the “protection” that is relevant differs from a co-insured's liability interest because it is protection as between co-insureds based on some form of underlying contractual relationship, which in turn is recognised and accepted by the insurer.

Protective co-insurance of a third party may be combined with a “value interest” co-insurance or with a “liability interest” co-insurance, as these expressions are explained above. However, there are many cases where a co-insured third party will lack a real “value interest” or “liability interest”. An illustrative example is the manager of a vessel, who is often named as co-insured under the owner's hull insurance, irrespective of the fact that he has no ownership interest and irrespective of whether the insurance contract includes collision liability. The benefit to the co-insured third party under Nordic law and under many other jurisdictions is that the insurer in such a case may not exercise rights of subrogation against the co-insured in order to claim reimbursement for losses or liabilities that the insurer has covered. The protective interest of the co-insured is central to the way contracts and insurance are organised under a knock for knock regime. There are many different variants of this type of contract. The core of the knock for knock principle is an agreement that each party will retain and insure the risk for damage to its own property as well as liability for death or injury of its own personnel, and obtain from their respective insurers co-insurance and often a waiver of subrogation in favour of the other contracting party. Cl. 8-2 is a default solution for all cases where the primary purpose of the co-insurance is to cover a “protective” interest in accordance with an underlying

contract between the person effecting the insurance and the third party. Cl. 18-1 litra (i) contains more specific provisions for use in the case of MOUs, see also the Commentary to that provision.

The parties are free to enter into whatever co-insurance arrangements they think best serve their interests. However, it seems convenient to have a set of standard rules in the Plan as a point of departure. This should not discourage the parties from carefully considering the need for the various interests to be co-insured and carefully drawing up appropriate insurance clauses that match their underlying contractual arrangements. No standard rules on co-insurance can fit all the needs of the various parties doing business in the complex international shipping and offshore markets.

### **Clause 8-1. Rights of third parties against the insurer**

The Clause corresponds to Cl. 8-1, sub-clause 1, of the 2013 Plan. In Version 2016, the last part of the sub-clause was added and the identification provision previously found in the sub-clause was moved to Cl. 8-3, sub-clause 3.

NMIP 2013 Cl. 8-1, sub-clause 2, had references to Cl. 7-3, sub-clause 1, and to Cl. 7-4, sub-clause 6. The first reference was replaced in 2016 with the present Cl. 8-5. As for the second reference, the provision was not repeated in 2016. This implies that the insurer is entitled to set-off outstanding premium and any other claim he may have in the compensation payable under the insurance contract, provided the conditions for set-off are satisfied according to the applicable law.

The first part of the provision defines under what circumstances a third party other than the contractual mortgagees may be given rights under the insurance contract. Contrary to the rules in Chapter 7, there is no automatic co-insurance cover for such third parties. The insurance has to be explicitly effected for their benefit. This solution is chosen to protect the assured owner from a situation where parts of the compensation have to be paid to co-owners or others with registered rights or other interests in the ship without an advance agreement with the assured owner. Such third party interests will in particular be relevant for the hull insurances, as described in the General Commentary to Chapter 8 above.

The insurance contract must spell out who the third party is in order for him to be included as a co-insured party. This is normally done by explicitly naming the third party in the insurance contract. However, in practice arrangements are also common with a number of entities included as co-insured by some form of general non-specific reference, e.g. affiliated, associated or subsidiary companies of a named assured. Wordings like “as their interests may appear” are occasionally used. This kind of generic references will also activate the rules in Chapter 8, with the exception of Cl. 8-7 where the third party has to be explicitly named in order to achieve the protection given under this Clause.

When named as a co-insured, the insurance will also cover the third party's interests. As explained in the General Commentary to Chapter 8 above, such interests may be of different kinds: "value interest", "liability interest" and "protective interest". It is ordinarily not difficult to identify what interests the particular third party will have covered under the insurance. Most co-insured third parties will have a "protective interest" under the insurance, safeguarding them against subrogation claims from the insurer. Whether or not they also have a "value interest" and/or a "liability interest" to be covered under the insurance, may vary.

The interests of the co-insured third party are only covered "within the scope and overall limits of the insurance". The wording was new in 2016, but entails no material amendment from NMIP 2013. The wording entails that co-insurance of a third party will not extend the scope of the insurer's obligation to indemnify losses, costs or liabilities as defined in the insurance contract. Furthermore, the insurer will not be liable beyond the limits that apply to the insurance, be it the sum insured, the separate liability sum or the sum to cover costs of measures taken to avert or minimise loss, cf. Cl. 4-18. As stated in Cl. 8-3, sub-clause 3, the co-insurance does not give the third party independent cover. However, such independent cover may be arranged through special agreement, cf. Cl. 8-7.

## **Clause 8-2. Protection of third parties against subrogation claims from the insurer**

The Clause was new in 2016.

The first part of the provision states the main rule: The insurer has no right of subrogation against the co-insured third party. As mentioned in the General Commentary to Chapter 8 above, an important reason why the person effecting the insurance agrees to name the third party as a co-insured party under the insurance contract is normally to protect him from subrogation claims from the insurer.

The provision contains two exceptions from the main rule. The first is where the insurance contract itself prescribes that the right of subrogation of the insurer has been reserved. In such instances, the parties to the insurance contract have agreed specifically that the general principle of waiver of subrogation found in the main rule should not apply. If this is in breach with the promise given to the third party to protect him against a subrogation claim, the person effecting the insurance will need to find another insurer who is willing to accept the waiver of subrogation rule found in Cl. 8-2.

The second exception refers to a situation where the third party expressly has undertaken to remain liable for the relevant losses, even if he has been included as a co-insured party. Such undertaking should be in the form of a contractual obligation to the person effecting the insurance or to another assured. Since the third party's undertaking has to be express, it is normally not sufficient to rely on a provision in a standard contract making the third party liable for such loss. In order to fulfil the

requirement of an express undertaking, the commitment must be clear from a separate and individual provision in the contract between the parties. An example may illustrate how this can be done. If the standard charterparty between the assured owner of the ship and the charterer contains a “safe port” provision, the charterer will as a co-insured party be protected under the main rule of Cl. 8-2 against a subrogation claim from the insurer in case of damage caused by a breach of the provision. If the assured owner and/or the insurer requests a subrogation right for the insurer, he/they would have to secure that the charterer undertakes a specific contractual obligation to the assured owner. This can be done through a separate clause or rider in the contract with the owner, setting out that the charterer will remain liable for losses of the kind prescribed in the “safe port” provision despite the protection given to him by the co-insurance arrangement.

Some standard charterparties expressly regulate the question of the insurer’s right to subrogation where the charterer is included as a co-insured party. Supplytime 2005 Cl. 17(a)(ii) states:

“The Charterers shall upon request be named as co-insured. The Owners shall upon request cause insurers to waive subrogation rights against the Charterers (as encompassed in Clause 14(e)(i)). Co-insurance and/or waivers of subrogation shall be given only insofar as these relate to liabilities which are properly the responsibility of the Owners under the terms of this Charter Party.”

With wording like this, the condition “expressly undertaken a contractual obligation to the assured to remain liable” must be seen as having been fulfilled, since the provision explicitly and clearly regulate the extent of the insurer’s right of subrogation in relation to the charterer (the third party).

The insurer has the burden of proof that an express contractual obligation for the third party to remain liable exists, and that the third party has in fact accepted it.

Accordingly, the effect of the provision in Cl. 8-2 is that a co-insured third party is fully protected against a subrogation claim from the insurer, *unless* the insurance contract itself reserves a right of subrogation for the insurer *or* the third party himself has expressly undertaken a contractual obligation to remain liable for the relevant type of loss, even if he has status as a co-insured party under the insurance.

Where the charterer under a charterparty with the assured owner of a vessel is not a co-insured third party under the insurance, the insurer has a right of subrogation against him, whether or not the charterparty specifically allows such a right. If at a later stage the charterer and the owner agree to give the charterer status as a co-insured party, the insurer will lose his right of subrogation unless the charterer expressly undertakes a contractual obligation towards the owner to remain liable for the relevant type of loss.

### Clause 8-3. Application of the rules in Chapter 3 and Cl. 5-1

The Clause was new in 2016. Sub-clause 1 is identical with Cl. 8-2, sub-clause 1, of the 2013 Plan, whereas Cl. 8-2, sub-clause 2, of the 2013 Plan is deleted. Sub-clause 3 repeats the identification clause found in the 2013 Plan, Cl. 8-1 *in fine*.

The provision in *sub-clause 1* regulates a situation where the third party is in possession of information that has a bearing on the insurer's assessment of the risk. If the co-insured third party knows that the insurance is also taken for his benefit, he has the same duty as the person effecting the insurance to give the information he has to the insurer. A co-insured third party's failure to do so will be assessed under the general rules relating to the duty of disclosure contained in the Plan. The rule means that there is a difference between mortgagees and other co-insured parties on this point, given that a mortgagee will not be subject to any duty of disclosure under Chapter 7.

A duty of disclosure for the third party presupposes that he is aware of the fact that the insurance is affected. If a third party is unaware of the insurance, it is hardly conceivable that he has failed to comply with the duty of disclosure (or other duties) in a blameworthy manner.

Failure to fulfil this duty means that the third party risks losing his insurance cover according to the same rules that apply in relation to the person effecting the insurance. As a main rule, other assureds will not be identified with the one neglecting his duties. If the co-insured third party is the one who has the decision-making power concerning the running of the ship, Cl. 3-37 will apply. This was previously expressed in Cl. 8-2, sub-clause 2, but the situation is unpractical and the express rule was left out in Version 2016.

The provision only governs the third party's breach of his duty of disclosure. This is due to the fact that these rules are aimed at the person effecting the insurance. Hence, a special authority is therefore required to impose a duty of disclosure on the co-insured third party.

*Sub-clause 2* on the other hand governs the third party's breach of the rules relating to duty of care. The provision gives the insurer the right to invoke the rules in Chapter 3, Sections 2 to 5 or Cl. 5-1 against the third party. It may be argued that the provision is superfluous, since the rules relating to the duty of care are aimed directly at "the assured" and the third party as a co-insured party is covered by this expression. However, for the sake of information, it is considered helpful to introduce a specific provision to this effect. If a co-insured third party fails to comply with any of the duties found in the provisions referred to, the insurer will be entitled to invoke these rules directly.

Whereas sub-clauses 1 and 2 signalize the effect on the insurance cover of the co-insured third party of his own faults or negligence, *sub-clause 3* regulates the question of identification, i.e. to what extent

faults or negligence committed by others may be invoked against the co-insured third party. The provision states that the co-insurance of the third party is not providing an independent cover, and that he must accept identification with others in accordance with Cl. 3-36 to Cl. 3-38. A similar rule is found in Cl. 7-1 *in fine* for mortgagees under Chapter 7, and reference is therefore made to the explanations given in the Commentary to Cl. 7-1.

#### **Clause 8-4. Amendments and cancellation of the insurance contract**

This Clause corresponds to Cl. 8-3 of the 2013 Plan. The Clause was not amended in substance in 2016, but the words “any co-insured third party” has been replaced by the words “the co-insured third party”.

The provision gives the person effecting the insurance a far-reaching authority to amend or cancel the insurance contract with effect for the co-insured third party. His agreement with the insurer to alter the insurance contract or end it, is binding on the third party. The Clause is different from Cl. 7-2, which requires that the mortgagee shall be given not less than 14 days’ notice before his rights are affected by any amendments or cancellation of the insurance contract. The provision in Cl. 8-4 applies whether or not the contract between the person effecting the insurance and the third party contains provisions that requires consultations with the third party before such changes are made. Should the insurer be aware of the undertaking towards the third party, ordinary rules of law will decide whether the insurer is free to ignore this information.

#### **Clause 8-5. Handling of claims, claims adjustment, etc.**

The Clause was new in 2016, but corresponds to the provision found in Cl. 8-1, sub-clause 2, of the 2013 Plan which contained a reference to Cl. 7-3, sub-clause 1.

The provision states that a co-insured third party is not entitled to participate in discussions in respect of casualties, adjustments or claims against a third party. All decisions in this respect may be taken without the co-insured third party’s agreement. This is the same rule that applies to a co-insured mortgagee, cf. Cl. 7-3, sub-clause 1. It would be inexpedient and bothersome to involve a third party in the settlement of a claim. If the party effecting the insurance wants to secure a better position for the co-insured third party, this must be agreed specifically with the insurer.

#### **Clause 8-6. Other insurance**

The Clause was new in 2016.

The provision prescribes that the insurance is subsidiary to another insurance that the co-insured third party has taken out. Consequently, the insurer shall only be liable to the extent that the co-insured third party has not obtained cover under the other insurance, cf. Cl. 2-6, sub-clause 2. If the other insurance also has a subsidiary provision, Cl. 2-6, sub-clause 1, shall prevail, cf. Cl. 2-6,

sub-clause 3, with the effect that the co-insured third party is free to claim under any of the two insurances.

### **Clause 8–7. Independent co-insurance of mortgagees or named third parties**

The Clause was new in 2016 and corresponds to Cl. 8-4 of the 2013 Plan. The title was altered to clarify that the Clause applies both to mortgagees and to named third parties. Certain modifications were also made in the text itself.

The provision gives extended protection to a mortgagee and a third party compared to the rules found in Chapter 7 and in Cl. 8-1 to Cl. 8-6. The extended cover can only be activated by an explicit agreement stating that the rules in Cl. 8-7 shall apply to the co-insured mortgagee and/or third party. Contrary to other clauses in Chapter 8, in order to receive the protection given in Cl. 8-7 the co-insured third party must be explicitly named in the insurance contract.

The independent cover implies that the co-insured mortgagee or named third party is not identified with the person effecting the insurance or with other assureds if found in breach with their duties under the contract. This means that the insurer can neither plead breach of the duty of disclosure on the part of the person effecting the insurance, nor a failure to meet the duty of care on the part of other assureds, e.g. the breach of a safety regulation. On the other hand, those clauses in Chapter 3 that objectively limit or exclude cover, e.g. Cl. 3-17 and Cl. 3-19, will also apply to the co-insured mortgagee or named third party if granted independent cover under Cl. 8-7.

Cl. 8-7 does not protect the independent co-insured mortgagee or named third party in the case of loss of cover resulting from a failure of the person effecting the insurance to pay the premium. In that event, the insurance will lapse according to the ordinary rules in Chapter 6, unless the co-insured mortgagee or named third party is willing to pay the outstanding premium as a means of keeping the insurance in force. The independent co-insurance under Cl. 8-7 will have no influence on the rule set out in Cl. 8-4, which provides that any amendment or cancellation of the insurance contract shall also apply to the co-insured third party under Chapter 8. The question does not arise under the comparable provision in Cl. 7-2, since this provision already gives an ordinary co-insured mortgagee better protection than a co-insured third party under Cl. 8-4.

An obvious but important limitation of the cover provided by Cl. 8-7 is that it only applies to the insurance to which it is attached. Therefore, it cannot be a full substitute for a so-called Mortgagee Interest Insurance. This type of insurance is a separate insurance, which is taken out for the benefit of a mortgagee bank on either a portfolio, fleet or individual basis. Such insurance protects the mortgagee if his position is prejudiced due to the acts or omissions of

an assured resulting in a loss of cover under the core insurances, including P&I-insurance and war risks insurance.

## Chapter 9

### Relations between the claims leader and co-insurers

#### General

An addition was made to the general Commentary in the 2007 version.

Chapter 9 contains rules relating to the relationship between the claims leader and the co-insurers. In practice, both hull insurances and the separate insurances against total loss are covered with a number of insurers who separately take on a portion of the risk. Each of these partial insurances is based on an independent agreement and the insurers issue separate insurance contracts.

As a main rule, an owner does not want to negotiate the insurance conditions with each individual insurer, but confines himself to reaching an agreement with one individual insurer (the rating leader), or with a few insurers. Such agreements are normally accepted automatically by the others. The relationship between the rating leader and the other insurers is not regulated in the Plan.

Additionally, as regards questions which arise during the insurance period - first and foremost questions in connection with casualties, salvage and the claims settlement - one of the insurers (the claims leader) will normally represent all of the insurers vis-à-vis the assured. The basis for this is often contained in what is known as a claims-leader clause. However, the 1964 Plan established a few explicit rules relating to the relationship between the claims leader and the other insurers, and these rules have essentially been retained in the Plan. Cl. 147 of the 1964 Plan, which provided the right to sue the co-insurers at the claims leader's venue, has, however, been incorporated in Cl. 1-4A, sub-clause 1 (c) of the Plan for insurances with a **Nordic** claims leader, and in sub-clause 3 for insurances with a **non-Nordic** claims leader. **In the 2019 Version, a default arbitration clause was added as Cl. 1-4B for insurances with non-Nordic claims leader.** Furthermore, the claims leader's authority has been expanded, see first and foremost Cl. 9-3, and new rules have also been introduced relating to the question as to how to deal with the claims leader's disbursements in the event of the co-insurer's bankruptcy, and relating to the claims leader's right to interest on disbursements in Cl. 9-10 and Cl. 9-11, respectively.

Questions that have not been regulated must, as before, be resolved on the basis of business considerations on a case-to-case basis. In the event of conflicts, it will be necessary to fall back on any agreements that may have been entered into, possibly supplemented with general background law.

If the insurance has been effected on Plan conditions, the co-insurers will be aware that the claims leader chosen by the assured is authorised to act on their behalf under the rules of Chapter 9. If they wish to change this authorisation, they may include a “claims leader following clause”. However, the standard clause is not intended for use in combination with Plan conditions.

The rules contained in this Chapter will only be applicable with respect to co-insurers who have also given insurances on Plan conditions.

### **Clause 9-1. Definitions**

This Clause corresponds to Cl. 139 of the 1964 Plan.

*Sub-clause 1* defines the term “claims leader” as the one who is stated as claims leader in the insurance contract. In practice, “claims leader” is used as the designation of the insurer who is to have contact with the assured in case of a casualty, who is to be in charge of the salvage operation and effect the claims settlement. The powers which under Cl. 9-3 to Cl. 9-9 are conferred on the claims leader are essentially in accordance with what has in practice been deemed to fall within his scope of competence.

Under English law a distinction is normally made between “rating leader” and “claims leader”. The Norwegian term “hovedassurandør” under the Plan comes closest to “claims leader”.

*Sub-clause 2* deals with the other co-insurers.

The provisions in Chapter 9 concern all types of insurance covered by the Plan, but they are most relevant for hull insurance. If several types of insurance have been effected for the ship, one claims leader must be designated for each type of insurance. The claims leader for hull insurance therefore only binds the hull insurers, not the insurers who have taken out hull or freight-interest insurance, war-risk insurance or loss-of-hire insurance.

As the rules in Cl. 10-13 and Chapter 14 show, however, there is a close connection between the ordinary hull insurance and the hull- and freight-interest insurances. It would therefore be practical if the decisions made in the relationship between the assured and the hull insurers were binding to a certain extent on the interest insurers as well. According to Cl. 14-3, sub-clause 4, a certain community has therefore been established between the claims leader under the hull insurance and the interest insurers as well.

The possibility of entitling the claims leader for hull insurance to bind the loss-of-hire insurer was discussed during the revision, but rejected as inexpedient.

In exceptional cases, an owner may choose an insurance package with one claims leader for all the insurances. The rules in Chapter 9 shall apply in such cases as well. Normally, the claims leader for the hull insurance will then be designated as the overall claims leader, with the result that he will bind all other insurers, even if he himself merely has a share in the hull cover.

The rules contained in Chapter 9 are based on the assumption that one of the insurers has explicitly been designated claims leader when the insurance was effected. The assured is thus free to decide whether he wants to cover all parts of the interest with independent insurers, who will in that case not be mutually dependent on each other. If he wants the advantages that the claims-leader arrangement entails, he must therefore designate one of his insurers as the claims leader and notify the other insurers whom he contacts accordingly. It is not a condition that the claims leader knows who the co-insurers are, however, although certain rules will not become effective unless the assured has notified the claims leader about who the co-insurers are, see in particular Cl. 9-4 about notifications of casualties.

## **Clause 9–2. The right of the claims leader to act on behalf of the co-insurers**

Sub-clause 1 was amended in the 2007 version. The sub-clause is otherwise identical to earlier versions of the 1996 Plan.

*Sub-clause 1, first sentence*, establishes the general principle that the claims leader has the right to bind the co-insurers in relation to the assured to the extent that this follows from Cl. 9-3 *et seq.* The arrangement is based on an extensive relationship of trust between the insurers, and it is therefore emphasised in the *second sentence* that when acting on behalf of all the insurers, the claims leader shall, as far as possible, take into consideration all the insurers' interests. Under *earlier versions of the 1996 Plan*, sub-clause 1, third sentence, he was also required to consult the co-insurers whom he knows of, provided that time permitted and that it was a matter "of importance". In the Commentary, this provision was followed up with the following wording: "If it turns out that there is a predominant desire among the insurers to resolve the matter in a specific manner, the claims leader is obliged to respect the majority's point of view. If not, he may become liable for damages vis-à-vis the co-insurers." This wording is not in keeping with the text of the Plan: the rule was a "should" rule and concerned consultation, not an obligation to take a poll to determine the majority opinion. Both the wording of the Commentary and the provision regarding consultation in the third sentence have given rise to problems in practice. Since the main point is that the claims leader has a duty to look after the interests of the insurers, both the rule on consultation and the statement in the Commentary have been deleted.

How far the duty to look after the co-insurers' interests goes must be determined on the basis of past practice and the purpose of the other provisions of Chapter 9. The Commentary on Cl. 9-8 explicitly states that the claims leader must submit questions relating to the institution of legal proceedings or the lodging of an appeal to the co-insurers. The co-insurers are obviously interested in being consulted in such situations and this should not cause any problems in terms of time.

With regard to the claims adjustment, on the other hand, the basic principle is that it is binding under Cl. 9-9 "provided that it is in accordance with the insurance conditions". An insurance settlement that is not in accordance with the insurance conditions is, on the other hand, not binding on the co-insurers and thus falls outside the scope of the claims leader's authority to act on their behalf, cf. also the Commentary on Cl. 9-9.

Otherwise, in keeping with the purpose of the provisions of Chapter 9 the claims leader normally does not need to consult the co-insurers in order to look after their interests. For instance, some of the point of the authority provided by Cl. 9-3 whereby the claims leader may approve the lay-up plan required under Cl. 3-26 will be lost if the claims leader is required to involve the co-insurers.

With regard to the claims leader's authority to make decisions in connection with salvage pursuant to Cl. 9-5, it will normally not be expedient to consult the co-insurers in connection with initiating a salvage operation. On the other hand, it is conceivable that the claims leader should notify the co-insurers before possibly abandoning a salvage operation, and should also keep the co-insurers informed about the salvage operation once it has commenced so that they have an opportunity to abandon the operation by paying the sum insured and limiting their liability for costs in accordance with Cl. 4-21. This applies in any case to more extensive salvage operations. Salvage can lead to great expense for insurers and the co-insurers therefore have a legitimate need to be informed about the situation in order to be able to limit their liability. The insurers who wish to continue the salvage operation may do so, provided the six-month time-limit laid down in Cl. 11-2 has not expired.

As far as removal and repairs are concerned, as well, the authority of the claims leader under Cl. 9-6 normally allows him to take action without consulting the co-insurers.

Even if the duty of the claims leader to safeguard the interests of the co-insurers normally does not entail any obligation to consult them, he is of course free to seek advice. It must be left to the discretion of the claims leader whether to consult the co-insurers in connection with questions relating to lay-up plans, salvage operations, removals and repairs.

*Sub-clause 2* contains a rule concerning the authority of the claims leader that is of great importance. If the claims leader has vis-à-vis the assured taken a decision that falls within his scope of authority under Clauses 9-3 to 9-8, the decision will be binding on all co-insurers in relation to the assured.

This authority shall only apply within the area where the rules contained in this Chapter confer authority on the claims leader. However, there is nothing to prevent a provision in the agreement with the assured to the effect that the claims leader shall have either a wider or a more restricted scope of authority than indicated by the Plan. The extent of this authority will depend on an ordinary interpretation of the agreement. According to the general principles of the law of contract, the steps taken by the claims leader vis-à-vis the assured will be binding, provided they come within the agreed scope of authority, and the assured does not have any reason to believe that the interests of the co-insurers have been disregarded.

Steps which fall outside the scope of authority will, however, never be binding on the co-insurers, regardless of what the assured might believe about the claims leader's right to act.

If the co-insurers wish to reduce the authority that the claims leader has under the rules in this Chapter, they must make an explicit reservation to that effect on the conclusion of the agreement.

If the claims leader, or one of the other co-insurers, due to special circumstances is prevented from reacting to negligence on the part of the assured or the person effecting the insurance, this will obviously not affect the legal position of the other co-insurers.

### **Clause 9-3. Lay-up plan**

According to Cl. 3-26, the assured shall if the ship is to be laid up draw up a lay-up plan and submit it to the insurer for his approval. It is not practical to send this plan to all the co-insurers; it must be sufficient that it is approved by the claims leader. Other notifications pursuant to Chapter 3, e.g., if a ship proceeds beyond the trading areas according to Cl. 3-15 must, however, be sent to all insurers.

### **Clause 9-4. Notification of a casualty**

This Clause was amended in the 2013 Plan.

Notifications of a casualty may be given to the claims leader with binding effect on the co-insurers, cf. *sub-clause 1*. It is of great practical importance for the assured that, in the event of a casualty, he can look to the claims leader. If the co-insurers want a stronger position, this must accordingly be agreed separately.

*Sub-clause 2* regulates the claims leader's obligation to pass on notifications to the co-insurers, unless the assured specifically agree with the claims leader to effect the notification to co-insurers directly or via brokers.

The provision is formulated as a duty for the claims leader, cf. the word "shall". However, no sanctions are imposed if the claims leader fails to pass on the information or is unduly delayed in doing so. As the assured according to sub-clause 1 is free of any further duty of notification by having notified the claims leader, any failure from the claims leader to pass on information will be risk of the co-insurers. Consequently, a failure to give notification will not affect the assured's claim against the co-insurers. If a co-insurer suffers a loss as a result of the failure to give notification, e.g., due to the fact that he does not manage to submit his objections to the claim in time, he may have to claim compensation from the claims leader under the general principles of the law of tort.

In practice, it will often be the broker who notifies the claims leader of the casualty, and the broker will then normally notify the co-insurers at the same time. If there is an assumption or it has been agreed with the co-insurers that notifications to the co-insurers under sub-clause 2 may be passed on through the assured's broker, delay on the part of the broker will be the co-insurers' risk. If they suffer a loss, they will in the event have to lodge a claim against the broker. They cannot recover the loss from the claims leader and refer him to recourse against the broker.

The Clause is primarily aimed at notification of casualties, cf. Cl. 3-29, the submission of claims for compensation, cf. Cl. 5-23, and demands that the claims adjustment be submitted to an average adjuster, cf. Cl. 5-5. But the provision also becomes significant during the further proceedings in connection with claims settlements. A co-insurer who is within the scope of the sub-clause cannot plead that the assured has forfeited a right by passivity, provided that the assured has vis-à-vis the claims leader done whatever is necessary to maintain his right.

However, the provision does not apply in relation to Cl. 5-24 relating to limitation. The limitation period must therefore be prevented from running in relation to each individual co-insurer. A different rule would be inexpedient and would in reality have to be based on the assumption that a judgment in an action against the claims leader would also have effect vis-à-vis the co-insurers. Nor is it sufficient to prevent the limitation period from running in relation to the co-insurers that the claims leader grants the assured an extension of the limitation period. However, the assured may stop the period from running by bringing a collective action against all the co-insurers in the venue of the claims leader, cf. Cl. 1-4A, sub-clauses 1, 2 **and 3**.

In the 2013 Plan it was specified that the duty to pass on information includes "claims advice with estimated costs". Such information should be presented by the claims leader as soon as possible after the relevant information about the casualty and the costs involved have been established. It is also a

duty for the claims leader to follow up with amended claim advices if major changes to the reserves arise.

### **Clause 9–5. Salvage**

This Clause corresponds to Cl. 142 of the 1964 Plan.

The provision authorises the claims leader to decide if, and in the event how, a salvage operation shall be conducted, and to decide when to abandon the salvage operation or whether the insurer shall exercise his authority to limit his liability for the salvage costs by paying the sum insured. The claims leader's authority on this point is in accordance with standard practice.

Cl. 142 of the 1964 Plan furthermore authorised the claims leader to decide what regulations should be issued in accordance with Cl. 53. This authority to issue regulations has, however, been deleted in the new Plan, and the provision has therefore been deleted.

### **Clause 9–6. Removal and repairs**

This Clause corresponds to Cl. 143 of the 1964 Plan.

The provision authorises the claims leader to grant requests for removal to a repair yard under Cl. 3-20 and to make decisions concerning repairs.

The claims leader's decision-making authority in relation to Cl. 3-20 is new and is based on practical considerations. The decision-making authority relating to repairs, however, is taken from the 1964 Plan and concords with established practice. However, Cl. 143, second sentence, of the 1964 Plan stipulated an exception as regards the question whether the ship was to be repaired at all, or whether the assured's request for condemnation should be granted. The reason for the exception was that the insurers might have conflicting interests, in particular where the claims leader had granted the owner a loan which he could perhaps only be expected to repay in the event of a total loss. The individual co-insurer had therefore been given an independent right to have the question of condemnation further elucidated by a removal of the ship for a survey under Cl. 166, or by inviting tenders. The provision had to be seen in conjunction with Cl. 43 of the 1964 Plan, which gave the co-insurers the right to limit their liability for damage resulting from the removal by refusing to accept it. In practice, the relationship between insurers who had and insurers who had not approved the removal caused problems: if the removal later proved successful with the result that the ship was not condemned, the question arose as to whether an insurer who had not approved the removal was to benefit from the result of the removal despite the fact that he had not borne any part of the risk associated with it.

The co-insurers' right to make an independent evaluation of the question of removal furthermore

raised a communication problem: when the decision regarding a removal was to be taken, all the insurers concerned had to be notified. This could result in delays in a situation where quick decisions were of the essence. In order to prevent such conflicts of interest between the insurers and delays as regards the condemnation decision, the Plan has authorised the claims leader to decide also this question of removal on behalf of all the insurers.

It follows from Cl. 9-2, cf. Cl. 14-3, that the claims leader's authority according to Cl. 9-6 applies both in relation to the co-insurers under the hull insurance and in relation to the insurers under the separate total-loss insurances. However, the authority does not apply in relation to the insurers under other insurances. These insurers may therefore demand that the ship be removed according to Cl. 11-6. The co-insurers' claims leader must in that event have the right to choose whether the hull insurers and the separate total-loss insurers shall participate in the removal or avoid further liability by paying the sum insured, cf. Cl. 4-21.

### **Clause 9-7. Provision of security**

This provision corresponds to Cl. 144 of the 1964 Plan.

*Sub-clause 1* regulates the claims leader's right to commission from the co-insurers upon the provision of security. Under Cl. 5-12 the insurer does not have any obligation to provide security for the assured's liability to third parties. However, in practice the hull insurer will to a large extent provide security for the assured's liability for salvage awards and collision compensation whenever required in order to prevent an arrest of the insured ship. Such security will normally be provided by the claims leader. The 1964 Plan did not contain any rules relating to commission for the claims leader when he in this manner in the interests of all the insurers provided a guarantee for collision liability vis-à-vis the person suffering the loss or for salvage awards vis-à-vis the salvors. However, it was accepted in practice that the claims leader was entitled to a commission, and this practice has now been explicitly established in the Plan. The commission is set at 1% and is charged once and for all, not on a per annum basis.

The claim for commission is subject to the condition that the guarantee is provided in "the interest of all the insurers". This will be the case if the person suffering the loss or the salvor demands a bank guarantee, and the claims leader is required to provide a guarantee vis-à-vis the bank because the assured is unable to obtain a guarantee himself against ordinary commission, cf. in this respect former practice.

*Sub-clause 2* corresponds to Cl. 144, sub-clause 1, of the 1964 Plan, but has been somewhat simplified. The provision discusses the effect of the claims leader informing the co-insurers that he has provided security for the assured's liability for collision compensation or salvage award. Such

notification deprives the assured of his position as creditor as regards cover of the liability invoked against him. If a co-insurer who has received such notification pays compensation in connection with the liability directly to the assured, he risks having to pay all or part of the amount again to the claims leader to the extent that the latter's provision of guarantee has become effective.

*Sub-clause 3* corresponds to Cl. 144, sub-clause 2 of the 1964 Plan and limits the co-insurer's right to plead a set-off when security has been provided. As mentioned in the Commentary on Cl. 7-4, the insurer has the right to set off any claims against the assured in respect of insurances on Plan conditions. This applies to outstanding premiums as well as to any other claims arising from the insurance contract. Unless otherwise agreed, a co-insurer's right to plead a set-off against the assured may also be exercised against the claims leader when the guarantee has become effective and the claims leader has a right of recourse. However, according to the Plan, the co-insurer's right is subject to the condition that he has reserved the right to plead a set-off prior to the provision of security. In practice, the claims leader will normally decide the question regarding security alone, which means that a co-insurer cannot expect to have the opportunity to make a reservation in connection with a notification of the provision of security according to Cl. 9-7. Accordingly, a co-insurer who wants at all times to be certain that his claims against the assured can be set off must keep the claims leader continuously informed of the magnitude of his claim.

It is only against the claims leader that the right to plead a set-off may be forfeited. If the assured himself covers the liability and the guarantee is released, the co-insurer may, of course, plead a set-off. Sub-clause 3 applies to all types of claims arising out of the insurance contract, including claims pertaining to other vessels.

It is conceivable that a creditor directs his claim against another ship that belongs to the assured, and that the claims leader for the ship to which the liability pertains provides security in order to obtain the release of the other ship. The rules in this sub-clause shall also apply to such a situation, given that no express condition has been stipulated to the effect that the purpose of providing security is to prevent the arrest of the insured ship.

The rules shall only apply, however, where the provision of security concerns a claim of the type described in this Clause, i.e. collision liability and salvage award. If the claims leader has provided security for a claim of a different type, e.g., a repair yard's outstanding claim, the co-insurers have an unconditional right to plead a set-off without making any special reservation in accordance with sub-clause 3.

## **Clause 9–8. Disputes with third parties**

This Clause is identical to earlier versions of the 1996 Plan. The Commentary was amended in the 2007 version in accordance with the amendment to Cl. 9-2.

The claims leader should also be empowered to represent all the co-insurers in the event of legal proceedings against a third party. The Clause authorises him to make the necessary decisions in connection with the legal proceedings and may be invoked vis-à-vis the courts as a basis for a general power-of-attorney to conduct the case. According to earlier versions of the 1996 Plan, “the question of commencing legal proceedings or lodging appeals will constitute ‘matters of importance’ and, as there will in those situations always be time for discussions among the insurers, it will invariably be the duty of the claims leader to submit the questions to those co-insurers of whom he is aware, cf. § 9-2”. This statement is not accurate now that the duty to consult the co-insurers has been revoked. It also follows from the rule prescribed in Cl. 9-2 that the claims leader has a duty to look after the interests of all the insurers that he must consult the co-insurers concerning the institution of legal proceedings or the lodging of appeals.

## **Clause 9–9. Claims adjustment**

The provision establishes that it is the claims leader who is responsible for the claims adjustment. In accordance with established practice, this is binding on the co-insurers, provided that it is in accordance with the insurance conditions. This implies that the claims leader’s discretionary decisions are binding, provided that the discretion is deemed to have been exercised within the framework of the conditions. If, on the other hand, he, for example, includes as recoverable a loss which, according to a correct interpretation of the Plan and the insurance contract, must be considered to be excluded, the co-insurers will not be bound. The co-insurers must also be entitled to contest a discretionary decision if the discretion has been exercised in such a manner that it must in reality be regarded as a departure from the conditions in favour of the assured.

In practice, the claims leader’s authority is sometimes specified in a “claims-leader clause”. In such clauses, the claims leader’s authority will often be extended in relation to Cl. 9-9, e.g. to also cover “settlements” or “compromised total loss settlements”. An extension of the claims leader’s authority has been regarded as a market question which must be solved in the individual insurance, and not through a general extension of the scope of Cl. 9-9.

If there is no such claims-leader clause, agreed settlements fall outside the scope of the claims leader’s authority under Cl. 9-9. An agreed settlement might, for instance, entail payment of a large amount in cash compensation in cases where the ship does not qualify for condemnation (in English often called “compromised” or “arranged total loss” under Cl. 11-3 of the Plan or the insurance conditions. Such settlements are not “in accordance with the insurance conditions” and are therefore not binding on the

co-insurers. In such cases, the claims leader therefore acts at his own risk. Therefore, if the claims leader is to get the co-insurers to agree to such settlements, he must consult them. If they agree, the settlement will also be binding on the co-insurers. If not, each individual insurer is free to do as he pleases as far as his own share of the insurance cover is concerned.

In connection with the claims settlement, the question may arise of whether the insurers can or should invoke the provisions of Chapter 3 of the Plan regarding breaches of the duty of disclosure, alteration of the risk, breach of safety regulations, etc. This type of decision lies outside the scope of the claims leader's authority, and the co-insurers will therefore not be bound by the views of the claims leader. In practice, the claims leader and the co-insurers will often discuss the question and come to an agreement as to the stance that they wish to adopt in relation to the assured. If, however, they do not agree, a majority of the insurers cannot be binding on a minority. Any disagreement regarding the facts or the application of the law must, in the customary way, be brought before the courts in accordance with the provision regarding jurisdiction in Cl. 1-4A of the Plan or be decided by arbitration if arbitration has been agreed in advance or is agreed in connection with the dispute.

A judgment in favour of the insurers is only binding on the insurers who are a party to the case. Insurers who have made full or partial payment as part of a compromise settlement with the assured will be bound by this agreement regardless of the outcome of the judgment. *Similarly*, a judgment in favour of the assured will not affect agreements that have already been concluded. The assured may not claim any additional settlement from insurers with whom he has entered into compromise agreements even if the latter entail payments that are lower than what the court has found to be correct.

Should the concluded agreements be contested by the assured or the insurer in accordance with the ordinary rules on the invalidity of agreements, a dispute concerning the validity of the agreement would have to be the subject of separate negotiations and court decisions.

Even if the assured is represented by a broker, and the claims leader has communicated with the co-insurers through the broker, the insurers may communicate with one another directly without going through the assured and the broker. In difficult cases involving important principles or of financial significance, the claims leader will often seek to establish a direct dialogue with the co-insurers.

## **Clause 9–10. Insolvency of a co-insurer**

This Clause was amended in the 2013 Plan.

The provision regulates the risk of a co-insurer becoming insolvent when the claims leader has had disbursements, part of which the co-insurer should have paid.

According to the *first sentence*, the assured bears the risk of a co-insurer's insolvency if the claims leader has had disbursements on behalf of the assured. This concords with what has been assumed in practice, and may be justified by considerations of consequences. If no claims leader had been appointed, the assured would have had to bear the risk of the co-insurer's insolvency, because the other co-insurers would merely have had pro-rata liability in proportion to their share of the insurance. This would have applied both to the actual payment of compensation and to the disbursements which were made by the assured to third parties in connection with the claims settlement, and which were recoverable under the insurance, e.g., disbursements for survey. The claims-leader system should not give a different result in an insolvency situation. The system indicates that the assured is the claims leader's principal, which means that under general rules of contract law he is liable for disbursements made by the claims leader on his behalf.

Disbursements made by the claims leader on behalf of all the co-insurers, on the other hand, are in principle no concern of the assured's. In that event, it must therefore be the joint risk of all the insurers if one of the co-insurers becomes insolvent. The *second sentence* was amended in the 2013 Plan and establishes now that the insolvent co-insurer's share of these disbursements shall be shared pro rata by the claims leader and the other co-insurers. If it turns out that another of the co-insurers becomes insolvent his share shall then be shared pro rata between the claims leader and the solvent co-insurers, and so on. In legal terminology in the Nordic countries such distribution of liability is called principal pro rata, and subsidiary joint and several.

The provision raises the question of the distinction between disbursements made on behalf of the assured and disbursements made on behalf of all the insurers. Disbursements related to the claims leader's consideration of, e.g. questions regarding salvage award, collision liability or grounding liability, are made on behalf of the assured. The same applies to the guarantee commissions. These are disbursements which might just as well have been made by the assured himself, but which the claims leader has undertaken on his behalf as a service. The same must apply to expenses for technical or legal assistance, and for that part of the claims leader's claim for a fee that is tied to an average adjustment, if any. The rest of the claims leader's fee claim in connection with the claims adjustment and expenses for survey is, however, claims or disbursements on behalf of all the insurers. If the claims leader leaves it to an average adjuster to make a claims adjustment in accordance with Cl. 5-2, the average adjuster's fee must also be no concern of the assured's.

### **Clause 9–11. Interest on the disbursements of the claims leader**

In practice, the claims leader will often make disbursements on behalf of all the insurers, e.g. for surveys. Accordingly, there is a need for a rule which entitles him to charge interest on these disbursements. For disbursements made by the claims leader on behalf of the assured, the duty of the

co-insurer to pay interest is in actual fact already implicit in the assured's right to interest under Cl. 5-4. However, it has sometimes been difficult in practice to gain acceptance for this view in the international insurance market. The provision therefore explicitly establishes that the duty to pay interest also applies to disbursements made by the claims leader on behalf of the assured.

It is the duty of the claims leader to show loyalty as regards the recovery of outstanding disbursements. If the insurance contract interest rate according to Cl. 5-4 is for a period of time higher than the market rate, he may not sit on the claim in order to thus increase the interest payable by the co-insurers.